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IN THE

Supreme Court of the United States

OCTOBER, 1957 TERM.

No. — 717

JOHN A. STEPHEN, formerly known as HANS AUGSTEIN, and OTTO AUGSTEIN,
Plaintiffs-Respondents,

—against—

ZIVNOSTENSKA BANKA; NATIONAL CORPORATION, also known as Zivnostenska Bank, National Corporation, formerly Zivnostenska Banka or Zivnostenska Bank,
Defendant-Appellant.

JURISDICTIONAL STATEMENT

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No. —

JOHN A. STEPHEN, formerly known as HANS AUGSTEIN, and OTTO AUGSTEIN,

Plaintiffs-Respondents,

—against—

ZIVNOSTENSKA BANKA, NATIONAL CORPORATION, also known as Zivnostenska Bank, National Corporation, formerly Zivnostenska Banka or Zivnostenska Bank,

Defendant-Appellant.

JURISDICTIONAL STATEMENT

Appellant appeals from the final order or judgment of the Court of Appeals of the State of New York, dated October 17, 1957, denying appellant's application for reargument or rehearing and from the judgment of the Court of Appeals of the State of New York entered on July 3, 1957 (both of which are printed as Appendix A hereto) and the judgment entered thereon in the Supreme Court of the State of New York on August 1, 1957 affirming the judgment of said Supreme Court of the State of New York entered on December 6, 1956, which judgment, in turn, affirmed the judgment of said Supreme Court of the State of New York entered on August 6, 1956. The judgment appointed permanent receivers of

the assets, within the State of New York, of the defendant, pursuant to § 977-b of the Civil Practice Act of the State of New York, upon the ground that defendant had been "nationalized" by decree or decrees of the government of Czechoslovakia. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

(a) Opinions Below

The opinion of Mr. Justice Irving L. Levey of the Supreme Court of the State of New York, County of New York, is reported unofficially in 140 N. Y. Supp. (2d) 323, and a copy thereof is attached hereto as Appendix B. It was on the basis of this opinion that an order was made in this action on March 25, 1955, directing a further trial as to whether or not the defendant had been nationalized within the meaning of § 977-b of the Civil Practice Act. Defendant appealed from said order to the Appellate Division, First Department, which affirmed the order without opinion at 286 App. Div. 999. A further trial was then had before Mr. Justice Louis Capozzoli of the Supreme Court of the State of New York, County of New York, who held that the defendant was so nationalized. His opinion, a copy of which is attached hereto as Appendix C, was not reported officially or unofficially, except that the same was printed in the New York Law Journal on June 28, 1956, at page 6 column 6. The judgment entered following this opinion was affirmed by the Appellate Division of the Supreme Court, without opinion, at 2 App. Div. (2d) 958 (Case 10), and the judgment of affirmance entered thereon on December 6, 1956, was affirmed by the Court of Appeals of the State of New York without opinion at 3 N. Y. (2d) 862. The order denying appellant's application for reargument or for rehearing was entered without opinion on October 17, 1957. [3 NY(2d) 941]

(b) Grounds Of Jurisdiction Of The Supreme Court

(i) This action was brought for the appointment of a permanent receiver or receivers of the assets within the State of New York of the defendant, upon the ground that the defendant had been nationalized by decree of the government of the Republic of Czechoslovakia. The plaintiffs alleged that they were creditors of the defendant and brought this action pursuant to the provisions of § 977-b of the Civil Practice Act of the State of New York, which statute authorizes the bringing of such an action for such purposes and upon such grounds by any creditor of a foreign corporation such as Zivnostenska Banka, the defendant herein.

(ii) The date of the judgment or decree of the Court of Appeals of the State of New York sought to be reviewed herein is July 3, 1957, and the date of the judgment of the Supreme Court of the State of New York entered thereon is August 1, 1957. The date of the order of the Court of Appeals of the State of New York denying the appellant's application for reargument or rehearing is October 17, 1957. The notice of appeal herein was filed in the office of the Clerk of the Supreme Court of the State of New York, County of New York, the court having possession of the record, on November 15, 1957.

(iii) It is believed that Title 28 U. S. Code § 1257(2) confers jurisdiction on this court upon this appeal.

(iv) The following cases are believed to sustain the jurisdiction of the Court to review the judgment in this case by appeal:

Adler et al. v. *Board of Education of the City of New York*, 342 U. S. 485;

Standard Oil Co. of California v. *Johnson*, 316 U. S. 481;

Hamilton v. *Regents of the University of California*, 293 U. S. 245;

Chy Lung v. *Freeman*, 92 U. S. 275;

United Automobile Workers v. *Wisconsin E. R. B.*, 351 U. S. 266.

(v) The validity of § 977-b of the Civil Practice Act of the State of New York is involved in the issues to be determined by this Court. The pertinent provisions of said statute are so lengthy that they are not printed here, but are set forth in Appendix D. The Statute may be found in Clevenger's 1957 Civil Practice Act at pages 8-47 to 8-50.

(c) The Questions Presented By This Appeal Are As Follows:

1. Whether § 977-b of the Civil Practice Act of the State of New York and the judgment appointing receivers of the assets of the defendant bank, within the State of New York, pursuant thereto were in violation of the Constitution of the United States, and an invasion of the power over foreign policy exclusively lodged by the said Constitution in the Government of the United States.

2. Whether the State of New York could validly disregard the nationalization decrees of the Government of Czechoslovakia, a government recognized by the United States, and any transfers of title effected by such decrees, as applied to property within the State of New York of Czechoslovakian corporations, and particularly whether it could do so for the benefit of persons other than those who dealt with the branch office or offices within the State of New York of such Czechoslovakian corporations, [redacted].

3. Whether the State of New York could validly disregard such nationalization decrees of Czechoslovakia, as applied to property which was not within the State of New York at the time that the nationalization decrees took effect.

(d) Statement Of The Facts Of The Case Insofar As Material To The Questions Presented By This Appeal

Plaintiff Otto Augstein and his son, the co-plaintiff John A. Stephen, were citizens and residents of the Republic of Czechoslovakia prior to the outbreak of World War II. They had made cash deposits in Prague with the home office of the Zivnostenska Banka, the defendant herein, which at that time was a joint stock banking corporation. Both plaintiffs left Czechoslovakia at or before the German invasion in 1939. When this action was commenced, the plaintiff Otto Augstein was a Canadian citizen.

On October 24, 1945, a decree of the President of the Republic of Czechoslovakia, No. 102 (R. 1 fols. 2206-2238)* was issued pursuant to which joint stock banking companies were "nationalized by transferring them to state ownership * * * and transformed into national enterprises (banks)."

In February 1948, after Decree 102 had become effective, the defendant bank as a national enterprise applied for a license to do business in New York State (T. R. Exs. 14, 20; R. 1, fols. 914-922). This application was granted by the New York Banking Department and a license was issued by the Superintendent of Banks on May 18, 1948, to the defendant bank as a national enterprise (R. 1, fols. 1024-1027). This license was surrendered sometime in March 1949 (R. 1, fol. 1023). The New York Banking Department, therefore, recognized the right of this defendant as a so-called nationalized corporation to do business in the State of New York and to have assets in that State. Moreover, the surrender of such license by the defendant in 1949 and the consequent liquidation of its business in New York State was under the New York Banking Law, which (§ 605) requires the payment of the claims of creditors of such corporation arising out of transactions had by them with its New York agency or agencies; so that the claims of all such creditors of the de-

* The designations "R. 1" and "R. 2" refer, respectively, to Volume 1 and Volume 2 of the Record on Appeal to the New York Court of Appeals.

fendant corporation were satisfied at that time under the supervision of the New York Banking Department.

On March 9, 1950 the National Assembly of the Czechoslovak Republic passed Law No. 31 of 1950 (R. 2, fols. 898-930) pursuant to which there was created the State Bank of Czechoslovakia. Article 2 of this Law provided that the State Bank should take over gradually, according to instructions of the Ministry of Finance "all rights and obligations of the * * * Zivnostenska Banka National Corporation." The same article in subdivision (2) provided that Zivnostenska Banka National Corporation, among others, shall end its activities by transferring to the State Bank all its rights and obligations and "shall cease to exist on a date to be determined by the Minister of Finance in a notice published in the Collection of Laws."

No notice was ever published in the Collection of Laws, but there was published in the Official Gazette of the Republic of Czechoslovakia (roughly similar to our Federal Register), on June 17, 1950 a Proclamation or Notice bearing No. 383 (R. 2, fols. 931-937). This notice provided that on July 3, 1950 the State Bank of Czechoslovakia should take over all the rights and liabilities of Zivnostenska Banka National Enterprise.

In 1952, plaintiff Otto Augstein a resident and citizen of Canada, and his son, John A. Stephen, commenced this action for the appointment of permanent receivers of the defendant's New York assets on the ground that it had been nationalized within the meaning of § 977-b of the Civil Practice Act. The action was commenced by the entry of an order ex parte appointing temporary receivers of the defendant's New York assets. The plaintiffs also obtained an order enjoining and restraining a number of New York banks from transferring or in any way disposing of assets in their possession of either the defendant or the State Bank of Czechoslovakia, the alleged successor of defendant. On a motion made by the plaintiffs to examine these New York banks as to such assets in their possession numerous substantive issues were raised by the defendant, and the State Bank of Czechoslovakia presented a claim for sovereign im-

munity as to its property, which was rejected (R. 1, fols. 609-641). All of the issues thus presented were referred to a referee (Mortimer Hays, Esq.) to hear and report with his recommendations. After numerous hearings extending over a period of two years, the said referee filed a report in which, among other things, he recommended findings (1) that the defendant had not been nationalized within the meaning of § 977-b of the Civil Practice Act, (2) that both plaintiffs were in any event barred from maintaining the action because of the provisions of the Czechoslovak foreign exchange regulations which were binding in the United States by reason of the International Monetary Fund Agreement, and (3) that the plaintiff Stephen was barred by a three-year statute of limitations contained in subdivision 23 of § 977-b of the Civil Practice Act. The defendant moved to confirm the referee's report in that respect and the Supreme Court, New York County, while confirming the report in all other respects, including the finding that Stephen was barred, disaffirmed as to the first two findings above mentioned. The Court held that since Czechoslovakia, as of December 31, 1954, ceased to be a member of the International Monetary Fund, plaintiffs were no longer barred by the International Monetary Fund Agreement. The Court also held that further evidence was necessary to determine whether defendant had been nationalized within the meaning of the statute, and it directed a further trial of that issue (R. 1, fols. 30-32, 2268-2271).

Thereafter the issue of nationalization was retried before Mr. Justice Capozzoli of the New York Supreme Court. At such further trial defendant argued that § 977-b of the Civil Practice Act was unconstitutional as applied to the assets of the defendant within the State of New York, because the statute constituted an unlawful invasion by the State of New York of the powers of the Federal Government over foreign policy, and particularly because the Federal Government had continuously maintained diplomatic relations with Czechoslovakia and had in fact entered into an agreement

with Czechoslovakia concerning the nationalization of properties by Czechoslovakia, and looking toward compensation therefor (R. 2, fols. 79-81, 797 to 807). This question was also argued in the trial brief submitted to Mr. Justice Capozzoli, as directed by the Court (R. 2, fol. 804).

The decision by Mr. Justice Capozzoli (R. 2, fols. 950-971) held that the defendant had been nationalized within the meaning of § 977-b of the Civil Practice Act, and directed judgment for the plaintiff Otto Augstein, appointing permanent receivers of the defendant's New York assets. In making such decision and directing the entry of such judgment, the Court necessarily rejected the defendant's argument that the statute was unconstitutional. The judgment also dismissed the complaint as to plaintiff Stephen.

The defendant appealed from such judgment to the Appellate Division, First Department, which affirmed the same without opinion, and in so doing again rejected the defendant's argument on the Constitutional grounds. The Appellate Division did, however, grant leave to the defendant to appeal to the Court of Appeals of the State of New York (R. 2, fols. 991-998) and the defendant did so appeal, and there again urged that the statute and the judgment entered in this action violated the Constitution of the United States. The Court of Appeals affirmed the judgment, again without opinion, but certified in its judgment of July 3, 1957, as amended by its order of October 17, 1957:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: the defendant argued that section 977-b of the New York Civil Practice Act and the appointment of a receiver pursuant thereto were in violation of established principles of constitutional law and in conflict with the foreign policy of the United States. This Court held that there was no such violation or conflict."

(e) The Substantial Nature Of The Questions Presented On This Appeal

Under § 977-b of the New York Civil Practice Act, the New York Courts have immobilized all of the New York assets of the defendant and also assets of the State Bank of Czechoslovakia and have seized the assets of the defendant, claiming the right to do so solely because New York does not approve of the nationalization program of Czechoslovakia. They have done this not for the benefit of local creditors, but for the benefit of creditors and stockholders of the defendant bank all over the world. Moreover, the judgment seizing the property of the defendant makes no distinction whatsoever as to property which came into the State of New York before or after the nationalization of the defendant.

The validity of § 977-b of the Civil Practice Act under the Constitution of the United States has never been specifically passed upon by this Court, but doubt as to its validity has been expressed both by this Court and by other Federal Courts. Thus, in *United States* v. *Pink*, 315 U. S. 203, this Court noted at page 231, that § 977-b of the Civil Practice Act expressed a policy which this Court held to be in conflict with federal policy and federal power.

In *Steingut* v. *Guaranty Trust Co. of New York*, 58 Fed. Supp. 623, affirmed on the opinion below at 161 Fed. (2d) 571, the Court held at page 634 as follows:

> "Manifestly, New York policy is not globular, is not designed to eliminate obstacles to friendly relations between the two nations, and erects a system of its own for the collection and distribution of the Russian assets. What New York can do every state can do; and in so doing, it is clear that 'the power of recognition might be thwarted or seriously diluted.' Id., 315 U. S. at page 230, 62 S. Ct. at page 565, 86 L. Ed. 796. To summarize: by means of § 977-b and the orders made herein, New York has gone beyond the

> establishment of a device for the protection of its citizens who are creditors of Russo-Asiatic or of those who did business with it in New York; it has established a complete system of administration founded upon a policy of non-recognition of the Russian nationalization decrees insofar as New York assets are concerned. Enforcement of this policy 'would collide with and subtract from the Federal policy;' Id., 315 U. S. at 231, 62 S. Ct. at page 566, 86 L. Ed. 796. It must, therefore, yield."

And in *United States* v. *National City Bank of New York*, 90 Fed. Supp. 448, the Court held at page 450:

> "§ 977-b, though enacted in 1936, after recognition of Soviet Russia, is, in its application to Russo-Asiatic, fore and aft, starboard to port, keel to masthead, built upon the conception of non-recognition. It collides head-on with the national policy embraced in recognition and the Litvinov assignment. This case is not distinguishable from U. S. v. Pink, 1942, 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 796, as the Receivers contend, by the circumstance that in the Pink case local creditors had been paid. The local creditors in the Pink case were 'creditors whose claims arose out of dealings with the New York branch,' 315 U. S. at page 226, 62 S. Ct. at page 564, of the First Russian Insurance Co. Russo-Asiatic never had a branch in New York."

The United States has at all times prior to and since the nationalization program of Czechoslovakia, maintained diplomatic relations with Czechoslovakia and indeed, in 1946, entered into an agreement with Czechoslovakia dealing in part with the effects of the nationalization program and looking toward eventual compensation therefor on behalf of American citizens (61 Stat. 2431-2435, par. 7).

We believe that the judgment in question, and the statute in question constitute an unlawful invasion by the State of New York of a field reserved exclusively to the Federal Government by the Constitution of the United States, and also conflict with the foreign policy of the United States as expressed in its recognition of the government of Czechoslovakia and of its nationalization program.

In *United States* v. *Belmont,* 301 U. S. 324, an action in which the United States Government sought to recover a deposit with the defendant originally made by a Russian corporation, which had been nationalized by Soviet Russia and whose interests had been assigned by the Soviet Government to the United States, this Court held that the policy of the State of New York not to recognize confiscatory acts of the Soviet Government could not be enforced in contradiction of the national policy of recognizing the Soviet Government and its nationalization decrees. This Court stated at pages 331, 332:

> "* * * In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist. Within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, state constitutions, state laws, and state policies are irrelevant to the inquiry and decision. It is inconceivable that any of them can be interposed as an obstacle to the effective operation of a federal constitutional power. Cf. Missouri v. Holland, 252 U. S. 416; Asakura v. Seattle, 265 U. S. 332, 341."
>
> * * * * *
>
> "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled."

In *United States v. Pink*, 315 U. S. 203, the United States Government sued to recover assets of the First Russian Insurance Company which were held by the defendant Pink as Superintendent of Insurance of the State of New York. The said insurance company having been nationalized by the Soviet Government, its property in New York was taken over by the Superintendent of Insurance who paid the claims of all those who had done business with the New York branch. The New York Court of Appeals had then directed the defendant to dispose of the balance by paying the claims of foreign creditors. The United States claimed title to these funds by virtue of the Litvinov Assignment which was delivered to the United States at the time it recognized the Soviet Government. This court held at pages 226, 227:

> "At the outset, it should be noted that, so far as appears, all creditors whose claims arose out of dealings with the New York branch have been paid. Thus we are not faced with the question whether New York's policy of protecting the so-called local creditors by giving them priority in the assets deposited with the State (Matter of People, 242 N. Y. 148, 158-159, 151 N. E. 159) should be recognized within the rule of Clark v. Williard, 294 U. S. 211, or should yield to the Federal policy expressed in the international compact or agreement. Santovincenzo v. Egan, 284 U. S. 30, 40; United States v. Belmont, supra. We intimate no opinion on that question. The contest here is between the United States and creditors of the Russian corporation who, we assume, are not citizens of this country and whose claims did not arise out of transactions with the New York branch. The United States is seeking to protect not only claims which it holds but also claims of its nationals."

And at pages 231-232:

> "Enforcement of New York's policy as formulated by the Moscow case would collide with and subtract

from the Federal policy, whether it was premised on the absence of extraterritorial effect of the Russian decrees, the conception of the New York branch as a distinct juristic personality, or disapproval by New York of the Russian program of nationalization. For the Moscow case refuses to give effect or recognition in New York to acts of the Soviet Government which the United States by its policy of recognition agreed no longer to question. Enforcement of such state policies would indeed tend to restore some of the precise impediments to friendly relations which the President intended to remove on inauguration of the policy of recognition of the Soviet Government. In the first place, such action by New York, no matter what gloss be given it, amounts to official disapproval or non-recognition of the nationalization program of the Soviet Government. That disapproval or non-recognition is in the face of a disavowal by the United States of any official concern with that program. It is in the face of the underlying policy adopted by the United States when it recognized the Soviet Government. In the second place, to the extent that the action of the State in refusing enforcement of the Litvinov Assignment results in reduction or non-payment of claims of our nationals, it helps keep alive one source of friction which the policy of recognition intended to remove. Thus the action of New York tends to restore some of the precise irritants which had long affected the relations between these two great nations and which the policy of recognition was designed to eliminate."

Finally, the Supreme Court held, at page 233:

"The action of New York in this case amounts in substance to a rejection of a part of the policy underlying recognition by this nation of Soviet Russia. Such power is not accorded a State in our constitutional system. To permit it would be to sanction a

dangerous invasion of Federal authority. For it would 'imperil the amicable relations between governments and vex the peace of nations.' Oetjen v. Central Leather Co., supra, p. 304. It would tend to disturb that equilibrium in our foreign relations which the political departments of our national government had diligently endeavored to establish.

"We repeat that there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively."

See also:

Steingut v. *Guaranty Trust Co. of New York* (*supra*);

U. S. v. *National City Bank of New York* (*supra*);

U. S. v. *New York Trust Company*, 75 Fed. Supp. 583.

The cases above cited were not based solely upon the fact that the United States Government was the claimant of the fund; the United States was held to have succeeded only to such rights as the Soviet Government had before the Litvinov Assignment:

Guaranty Trust Co. v. *U. S.*, 304 U. S. 126, 141-143;

U. S. v. *New York Trust Company* (*supra*), pp. 586, 587.

Although the *Pink* and *Belmont* cases did not deal with § 977-b of the Civil Practice Act and did not deal with Czechoslovakia or its nationalization program, we believe that the same principles there expressed are applicable in the case at bar.

The power to regulate foreign policy, like the power to regulate foreign commerce, is granted exclusively by the Constitution to the Federal Government. The effect of what any one State may do, which involves either of such fields, is felt not by that State alone, but by the entire Nation.

Chy Lung v. *Freeman*, 92 U. S. 275;

Henderson v. *Wickham*, 92 U. S. 259.

Moreover, we submit that even if New York had the power to act under § 977-b of the Civil Practice Act, it did not have the power to do so with respect to property of the defendant which was not within the State of New York at the time of nationalization. The mere continuance of diplomatic relations with Czechoslovakia subsequent to the nationalization of defend[illegible]t required the State of New York to recognize any change in title to at least such property as was not within the State of New York, which resulted from such nationalization.

Oetjen v. *Central Leather Co.*, 246 U. S. 297, 303, 304;

Ricaud et al. v. *American Metal Co., Ltd.*, 246 U. S. 304, 310.

The judgment in question makes no distinction whatsoever with respect to the time as of which the property seized thereby came into the State of New York.

We believe these questions are substantial and require the plenary consideration of this Court with briefs on the merits and oral argument, for their resolution. The problem involved in this case directly affects the relations between the United States and Czechoslovakia and obviously may affect the relations between the United States and other countries of both the East and the West. The question involved in its essence and reduced to its simplest terms, is whether New York or any other State in the United States may adopt and enforce a policy of refusing to recognize the nationalization

decrees of a foreign country with which the United States maintains diplomatic relations, particularly where the federal government has adopted a policy of recognizing such decrees. In this day and in these times, this question seems to us of paramount importance.

WHEREFORE, for the reasons above set forth, the federal questions are substantial and should be given plenary consideration by this Court with briefs on the merits and oral argument.

Respectfully submitted,

LEMUEL SKIDMORE,
Attorney for Appellant,
165 Broadway,
New York 6, N. Y.

APPENDIX A

Judgment Of Court Of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 3rd day of July in the year of our Lord one thousand nine hundred and fifty-seven, before the Judges of said Court.

Witness,

The HON. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR July 3, 1957.

No. 68

JOHN A. STEVEN, formerly known as HANS AUGSTEIN, and OTTO AUGSTEIN,

Respondents,

ZIVNOSTENSKA BANKA, NATIONAL CORPORATION, &c.,

Appellant.

BE IT REMEMBERED, that on the 1st day of March, in the year of our Lord one thousand nine hundred and fifty-seven, Zivnostenska Banka, National Corporation, &c., the appellant—in this cause, came here unto the Court of Appeals, by Putney, Twombly, Hall & Skidmore, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And John A. Steven, formerly known as Hans Augstein, and Otto

Augstein, the respondents in said cause, afterwards appeared in said Court of Appeals by Alexander Slater and Abraham Wolf, their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Lemuel Skidmore, of counsel for the appellant, and by Mr. Murray L. Jacobs, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

APPENDIX A (continued)

Order Amending Judgment And Denying Reargument

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventeenth day of October A. D. 1957.

Present, HON. ALBERT CONWAY,
Chief Judge Presiding.

No. 358

JOHN A. STEVEN, formerly known as HANS AUGSTEIN, and OTTO AUGSTEIN,
Respondents,

vs.

ZIVNOSTENSKA BANKA, NATIONAL CORPORATION, &c.,
Appellant.

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied with ten dollars costs and necessary printing disbursements, and it is

FURTHER ORDERED, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: the defendant argued that section 977-b of the New York Civil Practice Act and the appointment of a receiver pursuant thereto were in violation of established principles of constitutional law and in conflict with the foreign policy of the United States. This Court held that there was no such violation or conflict.

AND the Supreme Court, New York County, is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GERSON KIMBALL,
Deputy Clerk.

APPENDIX B

Opinion By Levey, J., On Motions To Confirm and Disaffirm Referee's Report

Stephen v. Zivnostenska Banka National Corp'n—The plaintiffs in this proceeding, father and son, seek to throw the assets of the defendant bank into permanent receivership upon the premise that they are creditors of an institution which has been "nationalized" within the meaning of section 977-b of the Civil Practice Act.

The temporary receivers, appointed by the court, have moved to examine certain New York banks, reputed to be holding funds for defendant's account.

Because of the many and complicated issues involved, one being the sensitive area of relationship between the United States and Czechoslovakia, it was deemed desirable to assign the entire matter to a referee to hear and fully report.

Initially, eight definite items of inquiry were agreed upon, and thereafter two pending applications were added, one relating to a bond of indemnity and the other to a release of certain funds.

The referee held seventeen hearings and filed an exhaustive report, consisting of seventy-seven pages. Pleasing to the court was the consensus of opinion by all counsel regarding the impartial and conscientious manner in which the hearings were conducted. The report reflects and justifies counsel's praise.

After extended oral arguments and consideration of the briefs submitted, I have reached the conclusion that the referee's report warrants confirmation in all respects except for the findings in connection with (1) nationalization, and (2) the plaintiffs' standing as creditors.

Concerning the first exception, it appears that section 977-b was enacted by the Legislature of this state to protect domestic creditors and stockholders from the confiscatory decrees of the Soviet government, promulgated in the early days of the Communist revolution.

Prior to its enactment, a sizeable body of case law had been developed in efforts to cope with Soviet decrees which sought to seize the assets of various Russian banks, insurance companies and other corporations (see, e.g., Moscow Fire Ins. Co. v. Bank of N. Y., 280 N. Y., 286, 305 (1939); Russian Reinsurance Co. v. Stoddard, 240 N. Y. 149, 163 (1925); Fred S. James & Co. v. Second Russian Insurance Co., 239 N. Y., 248, 256 (1925).

Presently, we are confronted with the problems of Czech nationalization, just as once before we wrestled with the intricacies of Soviet Russian decrees (see, Augstein v. Banska, 125 N. Y. S. 2d 647; also the numerous cases of Bata v. Bata, 279 App. Div., 855 and 1002, 304 N. Y., 644; also Bata National Corp'n v. Anchor Mercantile Co., Inc., N. Y. L. J., August 19, 1949, aff'd 276 App. Div., 896).

In a case similar to the one under review, Bata v. Bata A.S. & Svit National Corporation (Supreme Court, New York County, April 2, 1953, Index 32473, 1948), Justice Greenberg held that the plaintiff had established her right to the appointment of a permanent receiver pursuant to the provisions of section 977-b, where assets of the defendant Bata A.S. had been appropriated by the Czech government and later transferred to the Svit National Corporation, a creature of the Czech state.

It is evident in the instant case that the defendant bank was taken over by the Czech government and transformed into a national corporation by decree No. 102 of 1945. Defendant maintains in this connection, however, that its affairs have not been wound up nor is it in the process of liquidation, but article 2 of Law No. 31 of 1950 appears to be in direct contradiction of this view, since the Zivnostenska Banka "shall end (its) activities * * * and shall cease to exist on a day to be determined by the Minister of Finance in a notice published in the collection of laws."

On the other hand, there is testimony by a witness for the plaintiffs that the notice, just referred to, has not been published.

Defendant, conceivably, may still be in a position to meet its obligations to stockholders and creditors, but in the face of the facts now available, it should bear the burden of showing both its capacity and willingness to meet its responsibilities. At least, more information is essential as to current conditions.

Hence, the findings of the referee are modified to the extent of ordering a trial of this issue at an early date, in accordance with section 977-b, subdivision 9, C. P. A.

Regarding the second exception, that relating to the plaintiff's standing as creditors, as influenced by the International Monetary Fund Agreement, the referee noted the membership of Czechoslovakia in the International Monetary Fund, and considered particularly that portion of article VIII, section 2(b), of the Fund Agreement: "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member."

He therefore concluded that the plaintiffs could not obtain relief in this court (Perutz v. Bohemian Discount Bank in Liquidation, 304 N. Y., 533).

However, he did state, and with mindful foresight, that this phase could be reopened if Czechoslovakia ever withdrew, voluntarily or otherwise, from the fund organization. Such circumstance actually occurred on January 5, 1955, when the International Monetary Fund issued a release that Czechoslovakia was no longer a member (see photostats: letter from Department of State, dated January 10, 1955; together with press release No. 230; and Resolution of International Monetary Fund; filed herewith).

No valid reason currently exists to frustrate our public policy, as expressed in the controlling statute, and thereby allow Czechoslovakia to take advantage of one of the privileges of fund membership when it is no longer a member (see Bernstein v. N. V. Nederlandsche-Amerikaansche, 210 F. 2d 375 [Second Circuit, 1954]: Perutz v. Bohemian Discount

Bank in Liquidation, 304 N. Y., 533; Plesch v. Banque Nationale de la Republique d'Haiti, 273 App. Div., 244, aff'd 298 N. Y., 573; Bollack v. Societe Generale Pour Favoriser, &c., 263 App. Div., 601; Sulyok v. Penzintezeti Kospont Budapest, 279 App. Div., 528; Stern v. Pesti Magyar Kereskedelmi Bank, 303 N. Y., 881; Freund v. Laenderbank Wien Aktiengesellschaft, 277 App. Div., 770; Sabl v. Laenderbank Wien Aktiengesellschaft, 30 N. Y. S. 2d 608).

Accordingly, the present status of Czechoslovakia in relation to the International Monetary Fund does not bar the plaintiffs in this action.

The order fixing the referee's fee, which was agreed upon by counsel, is signed.

There is a dispute between the parties as to the liability for payment of the stenographer's fees. Such fee shall be divided equally.

The receiver's motion to examine the New York banks, which was held in abeyance pending the hearing and report of the referee, is now denied, without prejudice, pending the trial. Settle order.

APPENDIX C

Opinion By Mr. Justice Capozzoli

[SAME TITLE.]

This action was brought under Section 977-b, Subdivision 1, of the Civil Practice Act by the plaintiffs, as creditors, for the appointment of a permanent receiver of the defendant's assets within the State of New York on the ground that the defendant was nationalized, within the meaning of the aforementioned section.

The action was commenced by the entry of an ex parte order on May 3, 1952, appointing receivers of the defendant's New York assets. On May 12, 1952, an order was entered directing the various banks in the State of New York to show cause why they should not be examined in aid of the temporary receivership as to the assets of the defendant and of its alleged successor, State Bank of Czechoslovakia. This order contained a provision restraining the several banks from disposing of the assets of the defendant and of its alleged successor. On May 21, 1952, the restraining provision as to the State Bank of Czechoslovakia was modified so as to limit same only as to such assets of that bank as the domestic banks had on hand when the original restraining order was served upon them.

The defendant appeared in the action and filed an answer to the complaint. Many substantive questions of law and fact have been raised in the course of this proceeding. The State Bank of Czechoslovakia, although not a party to the action, filed a claim of immunity as to its property affected by the restraining order of May 12, 1952, on the ground that it was an instrumentality of the sovereign state of Czechoslovakia.

Because of the many and complicated issues involved, Mr. Justice Irving I. Levey, of this court, before whom the case came up originally, assigned the entire case to a Referee to hear and fully report. In all, ten definite items of inquiry

were agreed upon and, after many hearings, the Referee filed a report on July 20, 1954, consisting of seventy-seven pages. Mr. Justice Levey confirmed the report of the Referee in all respects except for the findings, one, nationalization, and two, plaintiffs' standing as creditors.

As to the second exception, Mr. Justice Levey did not confirm the findings of the Referee because, since the filing of the Referee's report, and on the 5th day of January, 1955, the International Monetary Fund issued a release to the effect that Czechoslovakia was no longer a member. This being so, Mr. Justice Levey held that Czechoslovakia could not claim the benefit of the privileges extended to members of the fund, one of which was the exemption of a member nation from any court action in the territory of another member nation, under certain conditions which the Referee found were present in the case before him. Therefore, Justice Levey ruled that the plaintiffs' standing as creditors was not affected by the then status of Czechoslovakia in relation to the International Monetary Fund.

As to the first exception, that of nationalization, Mr. Justice Levey reviewed briefly the reasons for the enactment of Section 977-b of the Civil Practice Act and referred to a number of cases decided before and after the enactment of said section. He concluded as follows: "Defendant, conceivably, may still be in a position to meet its obligations to stockholders and creditors, but in the face of the facts now available, it should bear the burden of showing both its capacity and willingness to meet its responsibilities. At least, more information is essential as to current conditions. Hence, the findings of the Referee are modified to the extent of ordering a trial of this issue at an early date, in accordance with Section 977, subd. 9, C. P. A."

The order of Mr. Justice Levey was affirmed by the Appellate Division (see 286 App. Div. 999).

Therefore, this court has limited the trial before it to the issue of nationalization, with a consideration of whether the defendant has the capacity and willingness to meet its responsibilities to stockholders and creditors, as provided by

Mr. Justice Levey. This court will not consider anything else. Whatever has been heretofore decided will not be reviewed by this court despite the contention of the defendant. This court does not agree that only a portion of the issue of nationalization is before it. It is of the opinion that the entire issue of nationalization is open. It believes further that, under the order of Mr. Justice Levey, the burden of going forward with proof on the capacity and willingness of the defendant to meet its responsibilities is upon the defendant, but the ultimate burden of proof on the entire issue of nationalization is upon the plaintiffs. In other words, the plaintiffs must establish, by a fair preponderance of evidence, that the defendant bank was nationalized, as set forth in the Civil Practice Act, Section 977-b, Subdivision 1.

At the trial before this court the defendant read into the record lengthy depositions of Dr. Jaraslav Fukatko, the chairman of the board of directors of the defendant, and Ivan Petr, the manager. These depositions were taken in the Peoples' Court of Prague, Czechoslovakia. The testimony was offered to support the contention of the defendant that it has the capacity and the willingness to meet its responsibilities, that it has not been nationalized within the meaning of the Civil Practice Act and that it is actually doing business.

The testimony of these witnesses is entirely unsatisfactory. They were unable to produce a balance sheet, book entries, financial statements or any factual proof bearing upon the activities of the defendant and its assets and liabilities. They refused to give certain other information without permission of government authorities, yet they repeatedly asserted that the defendant is doing business and there has been no order issued by the Czechoslovakian government terminating its existence.

At this point the court invites attention to Plaintiffs' Exhibit 1 in evidence. This exhibit is a copy of Law No. 31 of 1950, enacted by the National Assembly of the Czechoslovak Republic, on the 9th day of March, 1950. Article 2 of this law provides as follows:

> "(1) The Bank shall take over gradually, according to the instructions of the Ministry of Finance, all rights and obligations of the * * * 2. Zivnostenska Banka National Corporation * * *. (2) The institutions mentioned in paragraph (1) shall end their activities by transferring to the Bank their rights and obligations, and shall cease to exist on a day to be determined by the Minister of Finance in a Notice to be published in the Collection of Laws."

The wording of the last mentioned exhibit forces the conclusion that the defendant shall end its activities by a gradual transferring over of its rights and obligations and shall cease to exist on a day determined by the minister of finance, in a notice published in the Collection of Laws.

The question, therefore, is presented, as to whether the defendant is still doing business or is it out of business and no longer in existence. In this connection it is important to know whether the minister of finance ever issued the notice referred to in Plaintiffs' Exhibit 1. The defendant's witnesses, in their depositions repeatedly stated that such notice was never issued by the ministry, nor was its issuance contemplated.

When an examination is made of Plaintiff's Exhibit 2, in evidence, and its contents read, it is difficult to understand the attitude and the testimony of these witnesses. Plaintiffs' Exhibit 2 is entitled "Proclamation or Notice No. 383 of the Ministry of Finance, of June 17th, 1950," and it provides, amonst other things, as follows:

> "The Finance Ministry hereby publishes the following notice of instructions, pursuant to Article 2, Subd. 1 of the Law No. 31 of 1950 of the Collection of Laws, concerning the State Bank of Czechoslovakia. (1) On the 3rd day of July, 1950, the State Bank of Czechoslovakia shall take over, besides the rights and liabilities listed in paragraphs 2 and 3 hereof, all the rights and liabilities of * * * the Zivnostenska Banka

> National Enterprise * * *, as of the state of business at the end of the second planning quarter of 1950, i.e. as of the 2nd day of July, 1950, e.g. their cash on hand, securities and coupons, bills of exchange and checks * * *."

It is true that the publication of this notice, Plaintiffs' Exhibit 2, was made in the official gazette of the Republic of Czechoslovakia, rather than in the so-called Collection of Laws. But this is immaterial. What is important is the fact that the Ministry of Finance did exercise the authority granted to it by Plaintiffs' Exhibit 1, which resulted in the issuance of Plaintiffs' Exhibit 2. Surely, if there is any explanation for Plaintiffs' Exhibit 2 it should come from the defendant. But the record is silent as to any references to this exhibit by any of the witnesses of the defendant. Should not the chairman of the board have known that such an order of the Finance Ministry had been issued and should he not have given some explanation about it instead of denying that such an order was ever issued?

Since Plaintiffs' Exhibit 1 says that defendant "shall cease to exist on a day to be determined by the Minister of Finance, in a notice published in the Collection of Laws," and since such notice was published by the Ministry on June 17, 1950, Plaintiffs' Exhibit 2, how can the defendant's witnesses continue to testify, under oath, that no such notice mentioned in Plaintiffs' Exhibit 1 was ever issued or being contemplated and that the defendant is still doing business without any interference from the government? The conclusion is irresistible that the defendant has ceased to do business, it no longer exists and that it has not the capacity nor willingness to meet its responsibilities to stockholders and creditors.

When it is further considered that the defendant seeks to justify the non-payment of the claims of the plaintiffs on the ground that their property was confiscated by government decree, resulting from their adjudication as enemies of the state, certainly the courts of this jurisdiction should apply

the provisions of Section 977-b of the Civil Practice Act, which to this court seem to be aptly applicable to the factual situation at bar (Bata v. Bata, 285 App. Div. 1050).

The application of the plaintiff for an extra allowance is not being considered at this time. It should be made at the time of the settlement of the receiver's account, in accordance with the Civil Practice Act, Section 977-b, Subdivision 16-a.

This court agrees with the defendant that the complaint as to the plaintiff, John A. Stephen, should be dismissed on the strength of the finding by the Referee, confirmed by Mr. Justice Levey, that the plaintiff, John A. Stephen, was barred from maintaining this action by the three year statute of limitations contained in the Civil Practice Act, Section 977-b, Subdivision 23.

For the reasons above stated the court finds that the defendant has been nationalized under Section 977-b, Subdivision 1, of the Civil Practice Act and that the receivership be made permanent as to the plaintiff, Otto Augstein. The complaint is dismissed as to the plaintiff, John A. Stephen.

Settle judgment accordingly.

This constitutes the decision of the court in accordance with Section 440 of the Civil Practice Act.

APPENDIX D

Pertinent Provisions of Civil Practice Act, Section 977-b

§ 977-b. *Receivers to liquidate assets of foreign corporations.* 1. An action may be instituted in the supreme court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the state of New York, and (a) it has heretofore been or is hereafter dissolved, liquidated or nationalized or (b) its charter or organic law has heretofore been or hereafter is suspended, repealed, revoked or annulled, or (c) it has heretofore ceased or hereafter ceases to do business whether voluntarily or otherwise or by reason of the expiration of the term of its existence or by revocation or annulment of its organic law or by dissolution or otherwise.

2. Such action may be commenced by any domestic or foreign creditor, judgment creditor or attachment creditor or stockholder of such corporation, or by any plaintiff on whose behalf a warrant of attachment against the property of such corporation has heretofore been or may hereafter be issued.

3. Service of the summons in such action may be made personally within the state of New York, by delivery of the same to any officer or director of the corporation, or by publication pursuant to an order obtained as hereinafter provided.

4. Upon an affidavit reciting that personal service of the summons cannot be effected within the state of New York with due diligence and upon a summons and verified complaint alleging that the defendant is a foreign corporation and has or may have or may be entitled to assets, credits, choses in action or other property, tangible or intangible within the state and that such corporation has been dissolved,

nationalized, or that its charter or organic law has been suspended, repealed, annulled or revoked, or that it has ceased to do business, plaintiff may apply, without notice, to the supreme court or any judge or justice thereof for the appointment of a temporary receiver pending the determination of the action and the court must thereupon appoint such receiver who shall, from time to time, file such undertakings as the court may direct and shall take, receive and reduce to his possession any and all assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said foreign corporation and hold the same until the further order of the court. (Subd. 4 as amended by L. 1938, ch. 604, April 9.)

5. An order directing service by publication of the summons shall be made upon application of a plaintiff in any action brought pursuant to this section and must be founded upon verified complaint, containing the allegations set forth in subdivision four hereof, and upon an affidavit reciting that personal service of the summons cannot be effected within the state with due diligence and that a temporary receiver of its property within the state of New York has been appointed pursuant to this section in such action and that a copy of the order appointing the receiver has been served personally by or on behalf of such receiver upon a person, firm or corporation holding property, tangible or intangible, of the said foreign corporation, or against whom a claim or demand in favor of such foreign corporation exists and that demand therefor has been made upon such person, firm or corporation by or on behalf of such receiver.

* * * * *

10. In the event that the defendant defaults in answering, or if after a trial the court is satisfied that the defendant has ceased to do business by reason of any thing or matter whatsoever, or that it has been dissolved, liquidated or nationalized, or its charter or organic law has been suspended, repealed, revoked or annulled, the court must thereupon direct

judgment, appointing a permanent receiver and directing the receiver to liquidate the assets, credits, choses in action and property, tangible and intangible, in the state of New York of the said defendant, in the manner herein provided for. (Subd. 10 as amended by L. 1938, ch. 604, April 9.)

* * * * *

16. Upon settlement of the receiver's account, the court must direct payment in the following order and manner:

a. The costs and expenses of the action and of the receivership and the commissions and allowances and attorneys' fees in connection therewith shall first be paid, and if the court is satisfied that the action has been of benefit to the creditors of the said defendant it may allow the plaintiff his reasonable expenses including attorneys' fees in connection with such action.

b. The allowed claims, if any, of creditors with valid attachments issued out of any court in the state prior to the commencement of an action pursuant to this section, shall then be paid in the order of their priority. Attachments issued after the commencement of an action for the appointment of a receiver pursuant to this section shall be entitled to no priority by reason thereof.

c. The allowed claims which prior to the appointment of a receiver hereunder, accrued to or arose, wholly or partly, in favor of persons residing and corporations organized in the United States or in a state thereof and the allowed claims based on causes of action which accrued or arose in the state of New York shall then be paid.

d. The allowed claims of all other creditors of the corporation shall then be paid.

Any surplus remaining after making all of the aforesaid payments in the order mentioned shall then be paid to the stockholders of the corporation who have proved claims as such pro rata in accordance with their stockholdings, or in

the discretion of the court, to the receiver or liquidator, if any, appointed in the domicile of the corporation or elsewhere, provided such receiver or liquidator has proved his right thereto. (Subd. 16 as amended by L. 1938, ch. 604, April 9.)

17. Thereafter and as often as practicable the receiver shall file further accounts and give notice thereof as provided in subdivision fourteen hereof until the assets are entirely liquidated and distributed as hereinbefore provided.

18. The time between the cessation of business by the corporation or its dissolution or nationalization or the suspension, repeal, revocation or annulment of its charter or organic law, and the appointment of a receiver in this state pursuant to this section, whichever time is longer, plus three years after such appointment, shall not be a part of the time limited by domestic or foreign law for the commencement of an action or for the assertion of a claim therein by or on behalf of or against said corporation or by or against said receiver, whether or not said action or claim has heretofore been barred by any statute of limitations of this state or of any other state or country. (Subd. 18 as amended by L. 1938, ch. 604, April 9.)

19. Title to all assets, credits, choses in action and property, tangible and intangible, or any and every kind whatsoever, which such corporation owns, is entitled to or may be entitled to claim or receive within the state of New York shall immediately vest in the receiver upon the making of the order appointing him. The existence of such corporation and causes of action of or against such corporation existing at the time of its liquidation, dissolution, nationalization, expiration of its existence, repeal, suspension, revocation or annulment of its charter or organic law, or arising thereafter shall not be deemed ended, abated or affected thereby, nor shall actions brought by or against such corporation or a receiver appointed hereunder or any remedy therein be

deemed to have ended or abated or to have been affected by reason of such liquidation, dissolution, nationalization, expiration of its existence or suspension, repeal, revocation or annulment of its charter or organic law. This provision shall apply to all property, tangible and intangible, debts, demands and choses in action of such corporation within the state of New York, and to all litigation heretofore or hereafter brought in the courts of the state or of the United States to which the corporation or the receiver of said corporation appointed pursuant to the provisions of this section is a party. Any receiver appointed pursuant to the provisions of this section may be substituted for such corporation in any action or proceeding pending in the courts of the state or of the United States to which such corporation is a party and may intervene in any action or proceeding which relates to or affects any of the assets or claims of the corporation and may revive any action which shall have heretofore or which may hereafter have abated, and such liquidation, dissolution, nationalization, expiration of its existence, or repeal, suspension, revocation or annulment of its charter or organic law in the country of its domicile, or any confiscatory law or decree thereof, shall not be deemed to have any extraterritorial effect or validity as to the property, tangible or intangible, debts, demands or choses in action of such corporation within the state or any debts or obligations owing to such corporation from persons, firms or corporations residing, sojourning or doing business in the state. Nothing contained in this subdivision shall be deemed to validate claims for or causes of action or actions to recover property located in or moneys payable in the domicile of the corporation which are unenforcible under the laws of such domicile. (Subd. 19 as amended by L. 1941, ch. 926, May 1; L. 1938, ch. 604.)

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IN THE

Supreme Court of the United States

OCTOBER 1957 TERM.

No. 717

ZIVNOSTENSKA BANKA, AND SO FORTH,
Appellant,

—against—

STEPHEN, ET AL.,
Respondents.

BRIEF OPPOSING MOTION TO DISMISS APPEAL

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BRIEF OPPOSING MOTION TO DISMISS APPEAL

Questions 1 and 2 as set forth in the jurisdictional statement are substantial federal questions

Appellee, on the pretext that the statement by appellant in its jurisdictional statement of the questions presented by this appeal is "vague" and "discursive", restates the questions to suit the purposes of his argument. Question number 1 as restated by appellee is too narrow and moreover is incorrect. The question presented is not necessarily confined to a question of federal policy. Article VI, Clause 2, of the United States Constitution does not mention or refer to federal policy nor, we submit, does the question of the constitutionality of the New York Statute involved on this appeal hinge on Article VI, Clause 2, except as that clause makes the United States Constitution supreme

The exclusive right of the federal government to act in the field of foreigen relations is not derived from Article VI, Clause 2 alone. It is implied also from other powers awarded by the Constitution exclusively to the federal government, such as the power to declare war, to maintain an army and navy, to regulate commerce with foreign nations, appoint ambassadors and other public ministers, etc.

This power to act exclusively in the field of foreign relations is not a power delegated by the states. The states never had the power to act in that field, which was vested in the federal government under the Constitution as one of the essential attributes of sovereignty.

United States v. *Curtiss-Wright Corp.*, 299 U. S. 304, 315, *et seq.*;

Willoughby, Constitution of the United States, (2d Ed.) Vol. I, Sections 279-280, pp. 513-516.

Section 977-b of the New York Civil Practice Act is not simply a procedural or remedial statute. It is an announcement by the State of New York of its disapproval of foreign nationalization programs and of its intention not to enforce foreign nationalization decrees. The statute in fact is not confined, in its application, to confiscatory decrees. Where a foreign corporation has been or is "nationalized", the statute creates a cause of action in favor of any creditor or stockholder anywhere in the world, which otherwise would not exist (See *Canada Southern R.R. Co.* v. *Gebhard*, 109 U. S. 527, 538). Any such person may have a receiver appointed of all the assets of such nationalized corporation in the State of New York. The title to such assets passes to the receiver, who is directed to proceed to the distribution thereof to creditors and stockholders, foreign as well as domestic.

The statute has been applied in the case at bar to a situation where a nationalized bank has, by government decree, transferred its assets to the State Bank of Czechoslovakia,

which has assumed its liabilities and which, so far as appears, is financially as sound or sounder than the defendant bank.

There can be no question that this New York statute constitutes an invasion by the State of New York of the field of foreign relations. This court so indicated in *United States* v. *Pink*, 315 U. S. 203, 231. The lower federal courts have also so held.

> *Steingut* v. *Guaranty Trust Co. of New York*, 58 Fed. Supp. 623, 634, aff'd on op. below, except as to interest, 161 Fed. (2d) 571;
>
> *United States* v. *National City Bank of New York*, 90 Fed. Supp. 448;
>
> *United States* v. *New York Trust Co.*, 75 Fed. Supp. 583.

In the *Steingut and National City Bank* cases above cited, the District Court pointed out specifically that this very statute is designed to and does intervene in foreign policy.

Moreover, this statute was not enacted nor was this action brought for the protection of local creditors or even of United States citizens. In the case at bar there are no "local creditors". The New York branch of the appellant bank was liquidated in 1949 under the New York Banking Law and the claims of all creditors who had dealt with that branch were satisfied at that time under the supervision of the New York Banking Department. The plaintiff-appellee is a former citizen of Czechoslovakia, now a citizen of Canada, whose claim is based on deposits made with the Zivnostenska Bank in Czechoslovakia under a contract which provided that payment should be made at the bank's office in Prague (R. 1, fol. 1676, Appellant's Ex. E).

The cases of *Disconto Gesellschaft* v. *Umbreit and Clark* v. *Williard*, cited on page 11 of the motion to dismiss the appeal, therefore do not apply. See *United States* v. *Pink* (*supra*), at page 226.

We submit that the recognition of a foreign government *de jure* or *de facto* is a recognition of the validity of all its

actions, and that the courts of one nation will not sit in judgment on the acts of another. That this is true of decrees of nationalization, so far as they concern assets in the foreign country at the time of nationalization, there can be little question.

Oetjen v. *Central Leather Co.*, 246 U. S. 297;

Ricaud v. *American Metal Co., Ltd.*, 246 U. S. 304;

Underhill v. *Hernandez*, 168 U. S. 250.

This is also true of assets of a nationalized corporation which are in this country at the time of nationalization, where no rights of local creditors are involved. We submit that the reasoning of this Court in its decisions in *United States* v. *Belmont*, 301 U. S. 324, and *United States* v. *Pink (supra.)* supports this contention. These cases have been so construed by the decisions of the lower federal courts and other legal authority:

United States v. *Bank of New York & Trust Co.*, 77 Fed. (2d) 866, involved a deposit in the defendant bank of a balance of a fund deposited by Moscow Fire Insurance Co., a Russian insurance corporation, with the New York Superintendent of Insurance. Prior to the recognition of the Soviet Government by the United States on the execution of the Litvinov assignment, the Superintendent of Insurance had paid all claims of domestic creditors and had deposited the balance in the defendant bank subject to further order of the New York Court. After the recognition of Russia by the United States, and the execution of the Litvinov assignment, the United States sued the defendant bank in the United States District Court to recover possession of the fund, as assignee of the Soviet Government. The Circuit Court of Appeals held that by the recognition of the Soviet Government in 1933, the validity of the Soviet nationalization decrees was established and could no longer be questioned, and that this applied to assets of the nationalized corpora-

tion in the State of New York. It placed its decision on the ground of the effect of recognition of the Soviet Government and not on the effect of the so-called international agreement. At page 868 of its opinion the Court said:

> "We take judicial notice of the recognition of the Soviet Government by the United States on November 16, 1933, which was the day on which the assignment here relied upon was made. Underhill v. Hernandez, 168 U. S. 250, 18 S. Ct. 83, 42 L. Ed. 456. By that act of recognition the decrees under which this Russian corporation was dissolved and its property confiscated by the Soviet Government became as valid as they would have been had they been passed at a time when we had already recognized the Soviet Government. The effect of recognition was to that extent retroactive. Ricaud v. American Metal Co., 246 U. S. 304, 38 S. Ct. 312, 62 L. Ed. 733; Oetjen v. Central Leather Co., 246 U. S. 297, 38 S. Ct. 309, 62 L. Ed. 726. When our government recognized that government, the public policy of this country to recognize the validity of Soviet decrees within Soviet territory was established. No one will question the power of the government of the domicile of a corporation to destroy what it has created. Bank of Augusta v. Earle, 13 Pet. 519, 587, 10 L. Ed. 274; Head v. Providence Ins. Co., 2 Cranch, 127, 168, 2 L. Ed. 229. When the now recognized Soviet Government issued its decrees to that effect this corporation was dead. Oklahoma Natural Gas Co. v. State of Oklahoma, 273 U. S. 257, 47 S. Ct. 391, 71 L. Ed. 634; The Greyhound, 68 F. (2d) 832 (C.C.A.2). There can be no serious dispute that its property and all its corporate rights in Russia were subject to such disposition as actually took place in accordance with Russian law. The Russian State obviously could, and this record shows that it did, confiscate everything belonging to this corporation within the confines of Russia. It could, and did,

> acquire for itself every right the corporation in Russia possessed. It became the corporation there so far as we are now concerned. It had all its property and rights as fully as though the corporation had lawfully assigned them to it before dissolution. To that extent our public policy as to confiscatory decrees, so far as it may be expressed by our courts, is of no moment. When the executive branch recognized the Soviet Government, the judicial branch became bound to recognize the validity of Soviet decrees, in Soviet territory from the beginning of the Soviet regime. Oetjen v. Central Leather Co., supra. See, also, Lazard Bros. & Co. v. Midland Bank, Ltd. [1933] A. C. 289, H. of L., for the rule in England. Consequently we must for present purposes take the Soviet Government to have become to all intents and purposes the Russian insurance corporation in Russia which owned the deposit in New York subject to the fulfillment of the conditions upon which the deposit was made with the New York Superintendent of Insurance."

The District Court granted defendant's motion to dismiss the complaint on the ground that the State Court had prior jurisdiction and this was affirmed by the United States Supreme Court (296 U. S. 463).

In *Ozanic* v. *United States*, 83 Fed. Supp. 4, plaintiff as bailee of the S. S. Petar, sunk in collision with a U. S. Navy tanker, brought suit against the United States under the Public Vessels Act to recover for the loss of the vessel. A British corporation sought to intervene in the action as assignee of the claim from the Yugoslav Government which had nationalized the corporate owner of the Petar. The defendant pleaded the Anti-Assignment Statute. At page 6 of its opinion, the District Court said:

> "Since the Yugoslav Government is recognized by the United States, the original nationalization of the Petar's corporate owner by the Yugoslav Government

must be accorded respect, cf. United States v. Belmont, 1937, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134. and, considered as a transfer by operation of law so as to be without the statute."

The court held, however, that the assignment by the Yugoslav Government to the British Corporation was a voluntary assignment, and, therefore, void under the Anti-Assignment Act, and denied the motion to intervene.

The decision of the District Court was affirmed by the Circuit Court of Appeals for the Second Circuit, 188 Fed. (2d) 228. At page 229 of its opinion, the Circuit Court of Appeals said:

"At the time of the collision, and when the suit was commenced, a Yugoslav corporation owned the 'Petar'; but in December, 1946, the 'Praesidium' and National Assembly of Yugoslavia 'nationalized' the corporation by proceedings which professed to make the claim 'state property'; and it is common ground that it became so." [Citing United States v. Belmont, supra].

In *Latvian State Cargo & Passenger S. S. Line* v. *McGrath*, 188 Fed. (2d) 1000, plaintiff was a corporation nationalized by decree of the Latvian Soviet Socialist Republic, a government formed by the Russians at the time of their invasion of the Republic of Latvia. The record in the court below contained an affidavit by the United States Secretary of State certifying that the incorporation of Latvia into the Union of Soviet Socialist Republics was not recognized by the Government of the United States. The court held that an affirmative statement by the United States State Department of non-recognition of a foreign government is binding on our courts to the same extent as an act of official recognition of that government. At page 1002 of its opinion the Circuit Court of Appeals for the District of Columbia, said:

"It is settled by United States v. Belmont and United States v. Pink that if there is a formal act by the executive department, either of recognition or of

compact, the courts must give full effect to the terms of such act."

See also:

Day-Gormley Leather Co. v. *National City Bank*, 8 Fed. Supp. 503, 505, 506.

In Corpus Juris Secundum, International Law, Section 5, page 7, the rule is stated as follows:

"Recognition by the United States government of a foreign government operates to validate from the beginning the decrees of the foreign government confiscating and nationalizing property, including property within the United States where such property is embraced by the foreign decree (citing United States v. Pink; United States v. Bank of New York & Trust Co., and Day-Gormley Leather Co. v. National City Bank, all supra). In such case the national policy is paramount and overrides any contrary local public policy of the individual states, and the foreign decrees will be fully recognized and enforced as to local assets, at least where no local creditors have an interest (citing United States v. Pink; United States v. Belmont, and Steingut v. Guaranty Trust Co. of New York, all supra)."

Appellant's view of the applicable law and its interpretation of the *Belmont* and *Pink* cases, therefore, is shared by judges of the lower federal courts, as well as by the editors of one of our leading reference digests.

If a federal policy with respect to the validity and enforcement of the Czechoslovak nationalization decrees is necessary, we submit that recognition or, in this case, continued recognition of the Czechoslovak Government which enacted such decrees is in itself evidence of such a federal policy. Moreover, we have in this case further evidence of the adoption of a federal policy with respect to the Czechoslovak nationalization decrees in particular, and with respect to foreign nationalization programs in general.

In 1946 the United States and Czechoslovakia entered into an international agreement entitled "Agreement between the United States of America and Czechoslovakia respecting commercial policy": This agreement, recorded in full in 61 Stat. 2431-2435, contains the following provision:

> "7. The Government of the United States and the Government of Czechoslovakia will make adequate and effective compensation to nationals of one country with respect to their rights or interests in properties which have been or may be nationalized or requisitioned by the Government of the other country. In this connection, the Government of the United States has noted with satisfaction that negotiations concerning compensation on account of such claims will shortly begin in Praha."

Appellee argues that since that time there has been a change of administration in Czechoslovakia with a new political party in control and further states "that no substantive step has been taken in fulfillment of this eleven year old promise." The United States Government, however, has continued to recognize the Government of Czechoslovakia, despite the change in administration. Moreover, this agreement with Czechoslovakia is listed in State Department Publication 6427 entitled: "Treaties in Force, A List of Treaties and Other International Agreements of the United States, October 31, 1956." That publication, by its terms, contains "A list of treaties and other international agreements to which the United States has become a party and which are carried on the records of the Department of State as being in force on October 31, 1956" including "those treaties and other agreements which on that date had not expired by their terms or had not been denounced by the parties, replaced or superseded by other agreements, or otherwise definitely terminated." The United States Department of State, therefore has not denounced or terminated this agreement, but considers the same still in force and the assumption is that the efforts toward a settlement are still continuing.

Furthermore, at the time when the Suez Canal Company was nationalized by the Government of Egypt, a joint declaration was made by the Governments of France, the United Kingdom and the United States as follows:

> "They" (such governments) "do not question the right of Egypt to enjoy and exercise all the powers of a fully sovereign and independent nation, including the generally recognized right, under appropriate conditions, to nationalize assets, not impressed with an international interest, which are subject to its political authority." (Dept. of State Bulletin Vol. XXXV, #894, 8/13/56).

Again, addressing the United Nations General Assembly, explaining why the United States had voted against a resolution dealing with the development of undeveloped countries, the United States Delegate, Mr. Lubin, stated:

> "If I may turn now to the resolution that has been adopted, I should like to raise two questions. The first is: Was this resolution necessary? In other words, has any one questioned the right of a sovereign state to nationalize or the right of a sovereign state freely to develop its natural resources? * * * "
>
> "As to the first question, every government has the constitutional right to nationalize and—may I add—to denationalize not only its natural wealth, but also any property and any business within its jurisdiction."
>
> (Official Record of United Nations General Assembly, 7th Session, Plenary Sessions, p. 497).

The fact that the membership of Czechoslovakia in the International Monetary Fund was terminated is not an expression by our State Department of a policy not to recognize or enforce the Czechoslovakian nationalization decrees nor, we submit, does the press release issued by the State Department in connection with the termination of its obligations

with Czechoslovakia under the General Agreement on Tariffs and Trade, quoted on pages 9 and 10 of the motion to dismiss. We do not find in the reported cases any support for the appellee's contention that "friendly relations" are necessary, in addition to recognition, in order to validate decrees of a recognized foreign government. It is no doubt true that our relations with the Government of Czechoslovakia have been subject to difficulty and that we have been critical of some of the economic methods which it has adopted. All the more reason, we submit, that the Department of State should remain unhampered in the conduct of such relations, and that neither the State of New York nor any other state should be permitted to invade the field and, by statutory enactment, to disapprove and refuse to recognize or enforce the Czechoslovak nationalization decrees. It may very well be that this policy expressed in the New York Statute and the steps taken thereunder in this and other cases have contributed to the failure on the part of the two governments to arrive at a settlement as contemplated by the international agreement above mentioned.

It seems hardly conceivable that a state, under present conditions, should have the power to invalidate by statutory enactment the acts and decrees of a recognized foreign government, because it disapproves of the character of those decrees, especially for the benefit of foreign creditors and stockholders and where no rights of local creditors are involved. Nor does it seem conceivable that a state should have the right under authority of such statute to impound the funds of a foreign government agency, the State Bank of Czechoslovakia, for the benefit of foreigners, on the ground that it has acquired such assets under governmental decrees of which the state does not approve. As pointed out by this Court in *Chy Lung* v. *Freeman*, 92 U. S. 275, any counter-effect of such acts would fall not upon the state, but upon the government of the United States. In the words of Alexander Hamilton (Federalist Paper No. 80): "The peace of the *whole* ought not to be left at the disposal of a *part*. The Union will undoubtedly be answerable to foreign powers for the conduct of its members."

That there is a constitutional and therefore a federal question involved in this appeal has been certified by the New York Court of Appeals. Appellee says that this question is not substantial, but its importance today can hardly be disputed. Appellee apparently claims that the law is so clear that no consideration of the question by this Court is necessary. With the lower federal courts and one of the leading reference digests interpreting the law and the decisions of this Court in *Belmont* and *Pink* as supporting the position for which the the appellant contends on this appeal, and with the evidence here presented of a federal policy over and above the act of recognition, we submit that the federal question involved is substantial and should not be disposed of on a motion to dismiss the appeal.

Question 3 as set forth in the jurisdictional statement is substantial and is also properly raised

Appellee's interpretation of *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, and *Ricaud* v. *American Metal Co. Ltd.*, 246 U. S. 304, is incorrect. In both cases property in Mexico had been seized by the Mexican government and later was brought into the United States. In the *Oetjen* case the property was that of a Mexican citizen but in the *Ricaud* case it was the property of a United States citizen at the time of seizure. In both cases, it was urged that our courts were not bound to respect the title of the Mexican government acquired by confiscation, since the property was no longer in Mexico. Both held that the American Court was bound to recognize the act of the government which, after the seizure took place, became the recognized government of Mexico.

It is true that the referee did not pass on the merits of this question which he indicated was unnecessary because of his definition of the term "nationalization" (R 1, fol. 608). §977-b, however, makes all property in New York State of a nationalized foreign corporation subject to seizure and distribution, regardless of its location at the time of nationalization. The

judgment appealed from also makes no distinction, but directs the receivers to reduce to their possession and to liquidate and distribute "all assets, credits, choses in action and other property, tangible and intangible, within the State of New York, of the defendant Zivnostenska Banka, National Corporation." The failure of the statute to make this distinction is another factor in support of the appellant's claim that the statute is unconstitutional.

CONCLUSION

The appeal presents a substantial federal question which, according to the certification of the New York Court of Appeals, was presented to and passed upon by that court. We submit that the federal questions presented should be decided by this Court after a full hearing, and that the motion to dismiss the appeal should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER 1957 TERM

No. 717

ZIVNOSTENSKA BANKA, AND SO FORTH, *Appellant*,

— against —

STEPHEN, ET AL., *Respondents.*

MOTION TO DISMISS APPEAL

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IN THE

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— against —

STEPHEN, ET AL., *Respondents*.

MOTION TO DISMISS APPEAL

Respondents in the above-entitled case move to dismiss the appeal on the grounds that it does not present a substantial federal question, and that one of the two questions sought to be reviewed was not timely or properly raised or expressly passed on, as required by Rule 16 (1)(b) of this Court. The appeal is based on 28 U. S. Code Section 1257(2).

Appellant's statement of the questions presented by this appeal is so vague, and its statement of facts so discursive, as not accurately to reflect the simple issue presented by this appeal. We therefore feel obliged to give the Court our own version on these two points.

QUESTIONS PRESENTED

Whether Section 977-b of the Civil Practice Act of the State of New York and a New York State court judgment pursuant thereto, in providing for the appointment of receivers of the New York assets of a Czechoslovak banking corporation,

(1) interferes with any policy of the United States Government concerning the property or claims of Czechoslovak nationals or the nationalization decrees of the Czechoslovak government, thereby violating Article VI, Clause 2 of the United States Constitution;

(2) may, consistently with the federal Constitution, be applied to property in the State of New York which was not within the state at the time of the promulgation by the Czechoslovak government of its nationalization decrees.

STATEMENT

In 1952, plaintiffs-respondents herein commenced this action in the Supreme Court for New York County for the appointment of permanent receivers of defendant-appellant's New York assets, pursuant to Section 977-b of the New York Civil Practice Act, which establishes a procedure for the satisfaction of claims against foreign corporations that had been dissolved, liquidated, or nationalized. In conformity with Subdivision 1 of Section 977-b, the Supreme Court for New York County entered an order in May, 1953 appointing temporary receivers for appellant's New York assets (R. 1, fols. 37-45).

In connection with a motion by the respondents to examine certain New York banks as to the assets of

appellant in their possession, numerous substantive issues were raised (R. 1, fols. 448-452). All of the issues thus raised were tried before a Referee appointed by the Court, Mortimer Hays, Esq., who held numerous hearings extending over a period of two years. The report of the Referee (R. 1, fols. 439-675) was confirmed by Mr. Justice Irving L. Levey in the Supreme Court for New York County on all except two issues, one of which was resolved by the Court in respondents' favor (R. 1, fols. 2263-2277). There was a further trial before Mr. Justice Louis J. Capozzoli of the New York Supreme Court on the sole issue then remaining in the case, the appellant's contention that it had not been nationalized within the meaning of Section 977-b of the Civil Practice Act; this issue also was resolved by Judge Capozzoli in the respondents' favor. Judge Capozzoli's judgment of July 13, 1956, which appointed permanent receivers for the assets in question, was affirmed by the Appellate Division of the Supreme Court, 2 App. Div. (2d) 958 (Case 10), and by the Court of Appeals of the State of New York, 3 N. Y. (2d) 862, in both cases without opinion.

None of the ten issues tried before the Referee or before the New York court are before this Court upon this appeal. The sole issue before this Court is that referred to by the New York Court of Appeals, when it amended the remittitur to the Supreme Court of New York County as follows:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz: the defendant argued that section 977-b of the New York Civil Practice Act and the appointment of a receiver pursuant thereto were in violation of established principles of constitutional law and in conflict with

the foreign policy of the United States. This Court held that there was no such violation or conflict."

THE FIRST QUESTION IS NOT SUBSTANTIAL

Appellant's entire case to this Court stands or falls on its ability to bring itself within the rule of *United States* v. *Belmont*, 301 U.S. 324, and *United States* v. *Pink*, 315 U.S. 203, which it has failed to do. The decisive factor in those cases was the existence of an international compact between the United States and the Union of Soviet Socialist Republics, the essential terms of which were (1) recognition by the United States of the U.S.S.R.; (2) the establishment of friendly diplomatic relations; and (3) the execution of the so-called "Litvinov Assignment", pursuant to which the United States government recognized the validity of the nationalization decrees of the Soviet government and the Soviet government assigned to the United States all Soviet claims against assets located in this country. The relationship of our government to the Czechoslovak government in this case is entirely different from the relationship with the U.S.S.R. involved in the *Belmont* and *Pink* cases; the United States government has no agreement with the Czechoslovak government concerning the distribution of Czechoslovak assets located in this country and has denounced the nationalization decrees of Czechoslovakia as confiscatory (see pp. 9, 16, *infra*).

The Court in the *Belmont* case pointed out (at p. 330):

> "The recognition, establishment of diplomatic relations, the [Litvinov] assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments."

Article VI, Clause 2, of the Constitution expressly established the supremacy of treaties over state laws; "the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states". (Id., p. 331.) The Court did not even inquire whether there was any policy of the State of New York to be infringed, on the ground that "no state policy can prevail against the international compact here involved" (id., p. 327), and held the United States entitled to lay claim to deposits of a Russian corporation with a New York bank, despite the fact that New York's public policy was opposed to the Russian nationalization decree.

The *Belmont* case was practically determinative of the controversy in the *Pink* case, where the Court cited approvingly the passages just quoted (see 315 U.S. at p. 223), and held the United States entitled to the remaining assets of the New York branch of a nationalized Russian insurance company, as against the company and foreign creditors. In the *Pink* case there was stressed the "broad and inclusive" nature of the Litvinov Assignment, which "should be interpreted consonantly with the purpose of the compact to eliminate all possible sources of friction between these two great nations" (id., pp. 224-5; see also pp. 232-3). Said the Court:

> "It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent" (p. 230).

* * *

> "The purpose of the discussions leading to the policy of recognition was to resolve 'all questions outstanding' between the two nations. Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1 (1933), p. 1: Settlement of all American claims against Russia was one method of removing some of the prior objections to recognition based on the Soviet policy of nationalization. The Litvinov Assignment was not only part and parcel of the new policy of recognition (id. p. 13); it was also the method adopted by the Executive Department for alleviating in this country the rigors of nationalization. Congress tacitly recognized that policy.' (Id., p. 227.)

The District Court cases cited on pages 9-10 of appellant's jurisdictional statement are permeated with the same emphasis on the Litvinov Assignment as an integral part of the policy of recognition adopted by the Executive Department towards the Soviet Union; as the means chosen by the Executive Department (and endorsed by the Congress) for the satisfaction of unpaid claims against Russian nationals and for thereby removing an impediment to the resumption of friendly relations between the two governments; and as recognition by the Executive Department of the validity of the Russian nationalization decrees and of the extraterritorial effect to be given those decrees:

Steingut v. *Guaranty Trust Co. of New York*, 58 F. Supp. 623 (S.D.N.Y.), aff'd, 161 F. 2d 571 (C.C.A. 2), cert. den. 332 U.S. 807;

United States v *National City Bank of New York*, 90 F. Supp. 448 (S.D.N.Y.);

United States v. *New York Trust Co.*, 75 F. Supp. 583 (S.D.N.Y.).

These decisions (which involved Section 977-b of the New York Civil Practice Act) applied, to Russian decrees relating to the nationalization of banking corporations, the principles already laid down by this Court in the *Belmont* and *Pink* cases. The paragraphs cited by appellant stand only for the proposition that New York State could not enforce Section 977-b with respect to assets covered by the Russian nationalization decrees, because such enforcement "would collide with and subtract from the Federal policy" embraced in recognition and the Litvinov Assignment, *United States* v. *Pink, supra* at p. 231; *United States* v. *National City Bank, supra* at p. 450).

Section 977-b of the Civil Practice Act cannot interfere or collide with any national policy in this case, because there is no national policy governing the distribution of Czechoslovak assets in this country. In fact, the policy of Section 977-b to provide for the satisfaction of unpaid claims against the Czechoslovak government and nationals is consistent with our State Department's unqualified denunciation of the confiscatory decrees adopted by the Czechoslovak government.

There is involved here no international compact between the United States and the Czechoslovak government resolving the legal status of Czechoslovak assets in this country; no assignment to the United States nor equivalent device whereby unpaid claims against Czech nationals may be paid; no indication by the Executive Department that the nationalization decrees of the Czechoslovak government are to be given extraterritorial effect with respect to assets located in the United States; and no expression of national policy looking to the establishment of more amicable relations with the Czechoslovak government.

Since appellant is attacking the constitutionality of Section 977-b, it is its obligation to establish the existence of a national policy with respect to Czechoslovak assets in this country that would be impaired by the Section or the judgment herein. The sole evidence for the existence of such a national policy proffered by the appellant is a single paragraph in a 1946 executive agreement between the United States and Czechoslovakia (61 Stat. 2431-2435, Par. 7), in which the representatives of the two governments agree to make adequate and effective compensation to each other's nationals in connection with nationalized and requisitioned properties and note is made of the fact that negotiations for such compensation would shortly begin. Since that time, the then free government of Czechoslovakia has been succeeded by the current Communist regime, and no substantive step has been taken in fulfillment of this eleven-year-old promise. Moreover, the relationship between the United States and the Czech governments has deteriorated and the United States government has given the following official indications of its disapproval of the juridical, commercial and property policies pursued by the current government of Czechoslovakia. (Certain documents in which this disapproval is registered, which were judicially noticed and considered by the New York Court of Appeals in passing upon the constitutional issue, are reproduced for the Court's convenience as appendices to this motion):

1. The United States, on July 31, 1951, requested the Contracting Parties to the General Agreement on Tariffs and Trade to set aside the commitments of the General Agreement as they apply between the United States and Czechoslovakia (see Appendix A, Depart-

ment of State Bulletin, Vol. XXV, No. 634, Aug. 20, 1951, p. 290; Appendix B, Department of State Bulletin, Vol. XXV, No. 642, Oct. 15, 1951, pp. 622-624). The grounds assigned by the State Department for this proposed termination of obligations are interesting and pertinent:

> "When, in 1947, the Contracting Parties framed the obligations to one another which are contained in the General Agreement on Tariffs and Trade, it was assumed that the political relations of the countries concerned would be such that it would be in their mutual interests to promote the movement of goods, money, and people between them. It is now apparent that this assumption is no longer valid as between the United States and Czechoslovakia. On the contrary, *relations between the United States and Czechoslovakia have been progressively impaired by manifestations of Czechoslovak ill will toward the United States. The property of American nationals in Czechoslovakia has been confiscated, without compensation or any serious attempt on the part of Czechoslovakia to settle this matter.* American firms have been persecuted and harassed to such a degree that it is virtually impossible for them to do business with Czechoslovakia. Procurement of ordinary trade information essential to the conduct of commercial enterprises has been declared a crime. The United States has been forced, on extremely short notice, to reduce drastically the personnel of its Embassy in Prague. American citizens have been imprisoned without justification. American charitable and welfare organizations have been forced to discontinue their work.
>
> "The impairment of economic relations has been aggravated by the progressive integration of Czechoslovakia's economy into the Soviet bloc. Czechoslovakia has openly declared its intention of

administering its economy solely in the interests of the bloc. It has granted a special and guaranteed position in its economy to Soviet bloc corporations. It has left no room for doubt that its commitments to the United States are being subordinated or disregarded in the carrying out of its undertakings as a part of the Soviet economic bloc." (Italics supplied.)

2. Thereafter, the President of the United States, on October 2, 1951, notified the Secretary of the Treasury that, after November 1st, 1951, United States concessions made in trade agreements would be suspended with respect to imports from Czechoslovakia (see Appendix C, Department of State Bulletin, Vol. XXV, No. 642, Oct. 15, 1951, p. 621). This was done pursuant to the authority conferred by Congress on the President on June 16, 1951, 19 U.S.C. Sec. 1362.

3. Czechoslovakia was, on January 1, 1955, expelled from the International Monetary Fund for failure to fulfill its obligations under the Articles of Agreement of that body. (R. 1, fols. 2274, 721-726; R. 2, fols. 954-955). United States participation in the International Monetary Fund had been authorized by the Congress (see Public Law No. 171, c. 339, 79th Cong., 1st Sess.).

Since appellant is unable to point to any federal policy with respect to the distribution of Czechoslovak assets in this country, and the federal policy of condemnation of Czechoslovak nationalization decrees coincides with the policy of Section 977-b, the first question raised by appellant fails to present a substantial federal question.

In the absence of any obligation by way of treaty or executive agreement, the application by the courts of New York State of its own rules rather than those of a foreign country raises no federal question. *Disconto Gesellschaft* v. *Umbreit*, 208 U.S. 570. Where, as here, there is no national policy governing the distribution of foreign assets in this country, the well-established rule of *Clark* v. *Williard*, 294 U.S. 211, obtains:

> "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts." (p. 213).

So far as the United States Constitution is concerned, New York State has a free choice, in the handling of claims against assets under its physical control, between a policy of equal distribution by a statutory successor to the debtor corporation (the course adopted by it in this case when it appointed a receiver under Section 977-b) and piecemeal proceedings against the assets by individual creditors. *Clark* v. *Williard, supra*, at pp. 214-5; *Steingut* v. *Guaranty Trust Co., supra*, at p. 630. In the absence of a national policy with respect to the distribution of Czechoslovak assets in this country, New York State is free, with respect to assets located within its jurisdiction, to follow its own public policy and deny enforcement to foreign nationalization decrees which offend the public policy of the forum. *U. S.* v. *Pink, supra*, at p. 231; see *Griffin* v. *McCoach*, 313 U.S. 498, 506.

THE SECOND QUESTION IS NEITHER SUBSTANTIAL NOR PROPERLY RAISED

New York's plenary authority to apply appellant's assets within its jurisdiction to the satisfaction of claims against appellant does not depend upon whether those assets entered New York before or after the date of the Czechoslovak nationalization decrees. Therefore, the second question posed by this appeal fails to present a substantial federal question. In applying appellant's New York assets to the satisfaction of unpaid claims, New York is not denying the validity of the Czechoslovak nationalization decrees. It is merely refusing to give them extraterritorial enforcement within its own confines, because they transgress its public policy. Therefore, *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, and *Ricaud, et al.* v. *American Metal Co., Ltd.*, 246 U.S. 304, discussed on page 15 of appellant's jurisdictional statement, are inapplicable here.

Those cases both involved acts of the (subsequently recognized) Mexican Carranza regime in requisitioning, for military purposes, the Mexican property of Mexican citizens. In both cases, the issue presented to the lower federal court was which of two private claimants to the property (or compensation therefor) was entitled to prevail—a purchaser from the original Mexican owner of the requisitioned property or a purchaser from the Mexican government. This Court decided in favor of the latter, on the ground that the federal courts were constrained from examining the validity of the acts of the Mexican government with respect to property located in its own territory. There was presented no issue of confiscation by the Mexican government, no public policy reflected in the statutes or court decisions of any state of the union, and no question of affording extraterritorial enforcement to the decrees of a foreign sovereign.

Moreover, this Court should not decide the second question, because it was not properly presented in the record below. In his report, Referee Hays, before whom the case was originally tried, stated that the appellant had the burden of proving whether any property was brought into the state after the Czechoslovakian nationalization decree. According to him:

> "Since defendant chose to offer no affirmative proof of its own on this point, I do not have to reach the merits of its contentions, and express no opinion as to the validity of the argument." (R. 1, fols. 606-608.)

Judge Capozzoli, before whom the case was tried on the issues left open by the Referee's report, also commented adversely in his decision on the inability of the defendant-appellant to produce "any factual proof bearing upon the activities of the defendant and its assets and liabilities." (R. 2, fol. 960). Therefore, the second question raised by this appeal should be dismissed on the ground that it was not timely or properly raised, or expressly passed on.

CONCLUSION

WHEREFORE, the issues sought to be reviewed by appellant do not present a substantial federal question and were not timely or properly raised, or expressly passed on, and do not warrant further argument to this Court.

Respectfully submitted,

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Of Counsel

APPENDIX A

Excerpt from Department of State Bulletin, Vol. XXV, No. 634, Aug. 20, 1951, p. 290

SUSPENSION OF TRADE-AGREEMENT CONCESSIONS FROM COMMUNIST DOMINATED COUNTRIES

U. S. TO WITHDRAW TARIFF CONCESSIONS FROM CZECHOSLOVAKIA

[*Released to the press July 31*]

The United States has requested that the item "Termination of Obligations between the United States and Czechoslovakia" be placed on the agenda of the sixth session of the Contracting Parties to the General Agreement on Tariffs and Trade, scheduled to convene at Geneva on September 17. The following statement concerning the United States' position in this matter has been circulated to the Contracting Parties:

The United States has determined to withdraw from Czechoslovakia the benefits of trade agreement tariff concessions.

Since the United States and Czechoslovakia are Contracting Parties to the General Agreement on Tariffs and Trade, the United States proposes that at the sixth session all of the obligations existing between it and Czechoslovakia by virtue of the provisions of the Agreement should be formally terminated. This statement is a brief explanation of the factors involved in the United States decision.

When, in 1947, the Contracting Parties framed the obligations to one another which are contained in the General Agreement on Tariffs and Trade, it was assumed that the political relations of the countries concerned would be such that it would be in their mutual interests to promote the movement of goods, money, and people between them. It is now apparent that this assumption is no longer valid

as between the Untied States and Czechoslovakia. On the contrary, relations between the United States and Czechoslovakia have been progressively impaired by manifestations of Czechoslovak ill will toward the United States. The property of American nationals in Czechoslovakia has been confiscated, without compensation or any serious attempt on the part of Czechoslovakia to settle this matter. American firms have been persecuted and harassed to such a degree that it is virtually impossible for them to do business with Czechoslovakia. Procurement of ordinary trade information essential to the conduct of commercial enterprises has been declared a crime. The United States has been forced, on extremely short notice, to reduce drastically the personnel of its Embassy in Prague. American citizens have been imprisoned without justification. American charitable and welfare organizations have been forced to discontinue their work.

The impairment of economic relations has been aggravated by the progressive integration of Czechoslovakia's economy into the Soviet bloc. Czechoslovakia has openly declared its intention of administering its economy solely in the interests of the bloc. It has granted a special and guaranteed position in its economy to Soviet bloc corporations. It has left no room for doubt that its commitments to the United States are being subordinated or disregarded in the carrying out of its undertakings as a part of the Soviet economic bloc.

The United States attaches considerable importance to the maintenance of the General Agreement on Tariffs and Trade as an instrument through which nations which are in agreement on its broad objectives can work together in the economic sphere. The United States is of the view, therefore, that in the interests of maintaining the integrity of the General Agreement on Tariffs and Trade in its application to trade among nations with normal relations, the existing situation between the United States and

Czechoslovakia should be frankly and unequivocally recognized by the Contracting Parties, and the obligations between the two countries embodied in the Agreement, already rendered a nullity by political events, should be formally dissolved.

APPENDIX B

Excerpt from Department of State Bulletin, Vol. XXV, No. 642, Oct. 15, 1951, pp. 622-624

Severance of U.S.-Czechoslovak Commercial Policy Obligations Proposed

Statement by Willard L. Thorp
Assistant Secretary for Economic Affairs[1]

Let me begin by stating specifically what it is that we propose. * * *

* * * * *

Now, I should like to explain why the Government of the United States feels compelled to take the steps which it now proposes for the severance of commercial policy obligations between the United States and Czechoslovakia.

Economic benefits of Gatt nullified

It has been known to my Government for some time that the economic system of Czechoslovakia is being manipulated by its present Government in such a way as to nullify the economic benefits which the United States had expected to accrue from the General Agreement on Tariffs and Trade. Ordinarily these actions would, of course, properly be the subject of a complaint by the United States against Czechoslovakia pursuant to the provisions of article XXIII. But it is clear to us that there is and can be no real remedy under the provisions of article XXIII because we can not

[1] Made before delegates of the contracting parties to the General Agreement on Tariffs and Trade (Gatt) at Geneva, Switzerland, on Sept. 26; printed from telegraphic text.

reasonably anticipate an improvement of our commerce with Czechoslovakia so long as the present state of relations between us exists.

It is, I think, an elementary proposition that fruitful economic relations between any two countries, and the value of commercial obligations between them, must presuppose some reasonable degree of tolerance between the governments concerned, some reasonable degree of mutual respect, some reasonable degree of good faith by each in its dealing with the other. Intolerance, lack of respect, absence of good faith, must surely call into question the validity of promises, which at bottom, rest on a foundation of morality. If one government considers that another government has, as a matter of deliberate policy and practice, harassed its representatives and severely limited their number and scope of operations, if one government considers that another has systematically refused even to receive its representations or even to listen to its protests against acts in violation of treaties or of international law; if one government considers that another has persistently demonstrated untrustworthiness in its dealings between the two governments; if it is impossible for one government to obtain from another even the most elementary commercial and economic information which is essential to the conduct of commercial intercourse; if normal relations between business men and enterprises in the two countries are made impossible by drastic limitations on their activities; if there is no genuine means of communications between the two governments; then what possible basis can there be for the fulfillment of commercial policy obligations such as we find in the General Agreement on Tariffs and Trade? I think it must be abundantly clear that there can be none. The very premises on which the contract was based have been removed.

This, I believe, accurately describes the state of the relations which, under the regime of the present government

of Czechoslovakia, have developed between that government, and the Government of the United States.

Czechoslovak economic system altered

The negotiations which led to the assumption by Czechoslovakia and the United States of commercial policy obligations toward each other were concluded 4 years ago, in the fall of 1947. Since that time Czechoslovakia has radically altered its entire economic system, its method of doing business with the United States, and the general attitude of its government toward the people and Government of the United States. Following upon these basic changes which, I repeat took place after Czechoslovakia and the United States agreed to become parties to the General Agreement, the general relations between the two governments have steadily deteriorated. In the view of the United States these relations have now fallen below that minimum degree of mutual tolerance and respect which is essential to the effective discharge of the obligations of the General Agreement. We ask, therefore, that these obligations be formally liquidated in order that there may be no question as to their continuing validity.

* * * * *

To summarize, Mr. Chairman, our position on this matter:

1. We ask the contracting parties to suspend the obligations of the General Agreement between the United States and Czechoslovakia.

2. We ask this because of the exceptional circumstance that the general relations between the United States and Czechoslovakia have now become so fundamentally altered that commercial policy undertakings between them are no longer meaningful.

3. In seeking this action, we are requesting it in a form which will not disturb the relations which other contracting

parties may have or choose to have with ourselves or with Czechoslovakia.

4. Our proposal is in conformity with the spirit of the legal principles already recognized in the agreement. It would not, in our judgment, create a new and undesirable precedent for other cases less fundamental in character.

5. We consider our request to be entirely fair to all concerned and believe that it should be approved by the contracting parties as a matter of justice and common sense. Accordingly, we are confident that it will receive the necessary support.

APPENDIX C

Excerpt from Department of State Bulletin, Vol. XXV, No. 642, Oct. 15, 1951, p. 621

TRADE CONCESSIONS ON CZECHOSLOVAK IMPORTS SUSPENDED

PRESIDENT INVOKES PROVISION CONTAINED IN TRADE AGREEMENT EXTENSION ACT

[*Released to the press October 2*]

The President on October 2 notified the Department of the Treasury that after the close of business on November 1, 1951, U.S. concessions made in trade agreements will be suspended with regard to imports from Czechoslovakia. The action was taken in accordance with section 5 of the Trade Agreements Extension Act of 1951 which states, in part, that "As soon as practicable the President shall take such action as is necessary to suspend, withdraw, or prevent the application of any reduction in any rate of duty, or binding of any existing customs or excise treatment, or other concession contained in any trade agreement . . . . to imports from any nation or area dominated or controlled by the foreign government or foreign organization controlling the world Communist movement."

The Department of State announced on July 31, 1951,[1] that the United States had determined to withdraw from Czechoslovakia the benefits of trade-agreement tariff concessions and to request the contracting parties to the General Agreement on Tariffs and Trade, which is now meeting at Geneva, Switzerland, to concur in the termination of all of the obligations existing between this Government and Czechoslovakia by virtue of the provisions of the General Agreement.

On September 27 the contracting parties by a vote of 24 to 1, with four abstentions, agreed that the Governments of the United States and of Czechoslovakia should be free to suspend their obligations to each other which occur in the General Agreement. On September 29 the chairman of the United States delegation to the contracting parties notified the Secretariat of the contracting parties that the U.S. Government was invoking its rights under the declaration adopted on September 27 and was suspending, effective immediately and until further notice, the obligations of the United States with respect to Czechoslovakia under the General Agreement on Tariffs and Trade.

United States concessions provided for in schedule XX of the General Agreement will continue to be applied to imports from other countries to which the United States is currently granting the benefit of trade-agreement concessions.

On August 1 the President signed a proclamation ordering the suspension of trade-agreement concessions from Communist-dominated countries.[2] Because, however, on that date the United States had international commitments with several such countries which were not consistent with withdrawal of concessions from them, the proclamation

[1] BULLETIN of Aug. 20, 1951, p. 290.

[2] BULLETIN of Aug. 20, 1951, p. 291.

stated that the Treasury, from time to time, would be notified of the countries from whose goods the concessions should be suspended. On the same date the President notified the Treasury of the suspension, as of August 31, of trade-agreement concessions on imports from various specified countries.[3]

On September 17 the President notified the Treasury of the suspension, effective October 17, of trade-agreement concessions on imports from Bulgaria.[4]

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[3] *Ibid.*

[4] *Ibid.*, Oct. 1, 1951, p. 550.

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IN THE

Supreme Court of the United States

October Term, 1957

No. 717

ZIVNOSTENSKA BANKA, and so forth,
Defendant-Appellant,

v.

STEPHEN, *et al.*,
Plaintiffs-Respondents.

Motion for Leave to File Brief *Amici Curiae*, in Support of Motion to Dismiss Appeal Filed by Respondents, and Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 717

ZIVNOSTENSKA BANKA, and so forth,
Defendant-Appellant,

v.

STEPHEN, *et al.*,
Plaintiffs-Respondents.

Motion for Leave to File Brief *Amici Curiae*, in Support of Motion to Dismiss Appeal Filed by Respondents

---

May it Please the Court:

The undersigned, as counsel for Frank Petschek, Charles Petschek, William Petschek and Ernst N. Petschek, as Executor of the Estate of Ernest Petschek, deceased, respectfully moves the Honorable Court for leave to file the accompanying brief, *amici curiae*, in support of the motion to dismiss the appeal previously filed by the respondents. Counsel for appellant has refused to consent to the filing of this brief. Counsel for respondents originally stated that he would consent to the filing of this brief upon various conditions outlined by such counsel, but the undersigned has been unable to ascertain whether or not counsel for respondents would consent to the filing of this brief.

The following special reasons are set forth in support of this motion:

1. The movants are the joint owners of what is believed to be the largest single group of creditor claims against defendant-appellant's New York assets. These claims are owned by the four movants, as equal co-tenants. So much of the movants' claims are may be readily given a dollar value aggregate more than $850,000.00, on information and belief. In addition, the movants have substantial claims, not capable at this time of being stated with mathematical precision, based upon conversion of securities, or negligent custodianship of securities, by Zivnostenska Banka, or its predecessors. Moreover, movants as co-tenants have seizeable interests in Zivnostenska Banka as stockholders.

2. The movants are all citizens and residents of the United States and of the State of New York, unlike the plaintiff-respondent, who is a citizen and resident of Canada. Accordingly, the movants have a more substantial interest than does the plaintiff in the outcome of the appeal. The reason for this is that Subdivision 16 of Section 977-b of the New York Civil Practice Act (reprinted on page 33 of the Jurisdictional Statement filed by appellant) provides that the allowed claims of American residents and domestic corporations are entitled to priority of payment. The assets held by the receivers appointed under Section 977-b of the Civil Practice Act, I am informed, amount to less than $500,000. I am further advised that there are a large number of claimants, other than the present movants, who reside in the United States. It is therefore apparent that the group of claimants who are citizens and residents of the United States and New York should be represented on this motion.

3. It is further respectfully submitted that a number of the reasons requiring dismissal of the present appeal were not set forth in the able brief submitted on behalf of plaintiffs-respondents. These issues are set forth in the brief submitted herewith.

It is therefore respectfully requested that the motion for leave to file this brief *amici curiae* be granted.

Dated: New York, N. Y., February 26th, 1958.

ASHER LANS,
Attorney for Frank Petschek, Charles Petschek, William Petschek and Ernst N. Petschek; as Executor of the Estate of Ernest Petschek, deceased, Movants, Amici Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 717

ZIVNOSTENSKA BANKA, and so forth,
Defendant-Appellant,

v.

STEPHEN, *et al.*,
Plaintiffs-Respondents.

Brief of Frank Petschek, Charles Petschek, William Petschek and Ernst N. Petschek, As Executor of the Estate of Ernest Petschek, Deceased, in Support of Motion to Dismiss Appeal

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Preliminary Statement

Continuously since 1936, New York State has had in force legislation permitting the appointment of a receiver of the local assets of a dissolved, liquidated or nationalized foreign corporation or of a foreign corporation which has ceased to do business (New York Laws, 1936, ch. 917; Section 977-b Civil Practice Act of New York, reprinted in part in the Appendix to Appellant's Brief). Under the

cited section, receivers have under appropriate circumstances been appointed for the New York assets of dissolved or nationalized corporations domiciled in other states of the United States and in various foreign countries. In 1956, receivers were appointed for the New York assets of defendant-appellant, as a nationalized Czechoslovakian corporation. Defendant-appellant now asserts that such appointment and the applicability of Section 977-b to corporations organized in foreign countries derogates from the Federal Government's exclusive control of American international relations and justifies appeal to this Court. A motion to dismiss has been made on the ground that no substantial federal question is presented by the appeal.

ARGUMENT

POINT I

The question raised by appellant has long been settled and presents no substantial federal question.

A.

It is the established public policy of the State of New York that it will not enforce the confiscatory decrees of other jurisdictions. As was stated by the New York Court of Appeals in *Vladikavkazsky Railroad Company* v. *New York Trust Company*, 263 N. Y. 369, 378-9:

> "It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets, and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary

> to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts. * * *
>
> "Prior to recognition, we clearly intimated that our decision would have been the same if at the time recognition had been granted. James & Co. v. Second Russian Insurance Co., 239 N. Y. 248, 257, 146 N. E. 369, 37 A. L. R. 720."

Since this Court's decisions in *United States* v. *Belmont*, 301 U. S. 324, and *United States* v. *Pink*, 315 U. S. 203, the New York courts have reiterated the state's public policy that it will not enforce a foreign law or judgment which confiscates property, with a situs in New York, unless there is in effect a specific Federal Treaty or Executive Agreement explicitly requiring acquiescence in such expropriation. *Bollack* v. *Societe Generale, etc.*, 263 App. Div. 601, 33 N. Y. S. 2d 986.

It has consistently been held that a state of the United States may decline, because of repugnancy to its public policy, to enforce the expropriatory ukases of foreign jurisdictions against property having its situs in the domestic forum. *U. S.* v. *Percheman*, 7 Pet. 51, 87; *The Navemar*, 303 U. S. 68; *U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463; *Baglin* v. *Cusenier Co.*, 221 U. S. 580.

The applicable law has been most explicitly stated in the recent decision of the United States Court of Appeals for the Second Circuit in *Zwack* v. *Kraus Bros & Co.*, 237 F. 2d 255 (1956). The *Zwack* case involved the effect in the United States of nationalization decrees enacted by the Government of Hungary. The Court declared:

> "It is clear that the Hungarian Government could not directly seize the assets which have a situs in the state of forum. To allow it to do so indirectly

through confiscation or firm ownership would be to give its decree extra territorial effect and thereby emasculate the public policy of the forum against confiscation. This we decline to do."

Similar decisions have been rendered by courts throughout the world. *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (House of Lords, 1924), A. C., 112; *The Jupiter* (No. 31), (1927), P. D. 250, 253-5; *Sedgwick, Collins & Co.* v. *Rossia Ins. Co.* (House of Lords, 1927), App. Cases 95; *Etat Russe* v. *Rapit,* Trib. Marseille, April 23, 1925, 52 Clunet 391, aff'd by the Ct. of Cassation, 55 Clunet 674; *Lecouterir* v. *Rey* (House of Lords, 1910), A. C. 262; *Compagnie fermiere de la Grand Chartreuse* v. *Rey,* Tribunal Federal (Switzerland, July 11, 1913), 39 R. O. II 640, 652.

It is further clearly established that a state of the United States may constitutionally exercise control over property within its jurisdiction, which property is owned by a foreign entity. The appointment of a receiver of so much of the property of an expropriated, liquidated or dissolved foreign corporation as is located within the forum is merely one method of exercising such control over domestic property. The constitutional power to control in a non-discriminatory manner foreign owned property within the forum, as by appointing a receiver under appropriate circumstances, has been held to be an inherent attribute of territorial sovereignty. *Clark* v. *Willard,* 292 U. S. 112, 294 U. S. 211; *U. S.* v. *New York Trust Co.,* 75 F. Supp. 583; *Oliner* v. *American-Oriental Banking Corp.,* 252 App. Div. 212, 297 N. Y. S. 432, aff'd 277 N. Y. 588, 13 N. E. 2d 783.

Contrary to appellant's implication, Section 977-b of the New York Civil Practice Act was not enacted and does not refer specifically to the New York assets of the National-

ized corporations domiciled behind the Iron Curtain. In fact, receivers have been appointed under the section for the New York assets of Netherlands corporations (*Rothschild* v. *N. V. G.*, 194 Misc. 889, 88 N. Y. S. 2d 157), of West German Companies (*Bernstein* v. *N. V. Nederlandsche etc.*, 173 F. 2d 71), and even of corporations organized under the laws of Delaware (*Weinert* v. *Kinkel*, 296 N. Y. 151, 71 N. E. 2d 445) and of Connecticut (*Oliner* v. *American-Oriental Banking Corporation*, 277 N. Y. 588, 13 N. E. 2d 783).

It seems to be appellant's position that the appointment of a receiver for its New York assets under Section 977-b of the Civil Practice Act derogates from the control of foreign relations by the Federal government. However, the cases cited by appellant in its jurisdictional statement do not support its position or even indicate the existence of any substantial federal question. For these cases all were the judicial aftermath of the Litvinov Assignment, which was an international agreement between the United States and Russia by which the United States consented to give extra-territorial validity to Soviet nationalization legislation.

As was said in *U. S.* v. *Pink*, 315 U. S. 203, at page 203: "A treaty is 'Law' of the Land' under the supremacy clause (Art. VI, ch. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have similar dignity." To repeat what this court stated in *U. S. v. Belmont*, 303 U. S. 324, at 327: " • • • no state policy can prevail against the international compart (the Litvinov Assignment) here involved."

However, there is no international compact between the Republic of Czechoslovakia and the United States by which the Federal Government has agreed to enforce or even recognize the nationalization legislation of Czechoslovakia,

and no such agreement has been or can be cited by appellant.

Accordingly, the reference by appellant to the *Pink* and *Belmont* cases and similar cases is inapposite. In the absence of an appropriate international agreement, the United States has no interest in, and no substantial federal question is presented by, the New York domestic policy as embodied in Section 977-b of the New York Civil Practice Act.

Appellant further contends that, under the *Pink* and *Belmont* decisions, *supra*, the mere recognition of the Czechoslovakian Government by the United States necessitates that all states of the United States give extra-territorial validity to Czechoslovakia's confiscatory decrees. This argument is based upon a misconception of the *Pink* and *Belmont* decisions. Ordinarily the United States would have made an agreement with respect to international property rights only through a treaty, approved by the Senate under Article II, Section 2 of the United States Constitution. The Litvinov Assignment, however, was an agreement effected by the President on his own authority. The contention that the failure to secure Senatorial consent stripped the Litvinov Assignment of binding effect domestically was overruled by this court in the *Pink* and *Belmont* cases because the agreement with relation to property rights was held to be an incident of recognition of a foreign government, which is an admitted executive function. *U. S.* v. *Belmont*, *supra*, at p. 330; Borchard, *"Treaties and Executive Agreements"* (1945), 54 *Yale L. J.* 616, 645-8; Note (1945), 58 *Harv. L. Rev.* 612, 614.

Contrariwise, the *Pink* and *Belmont* cases, *supra*, and other decisions of the Federal courts indicate that the mere recognition of a foreign government does not give

its corporations a magic immunity to general domestic legislation or make the non-discriminatory application of such legislation to domiciliary corporations of such foreign state a federal question. *Baglin* v. *Cusenier Co.*, 221 U. S. 580; *United States* v. *Bank of New York and Trust Company*, 296 U. S. 463; *Zwack* v. *Kraus Bros. & Co.*, 237 Fed. 2d 255.

B.

Appellants further assert that "the foreign relations of the United States" are affected by the decision of the New York court herein and that therefore an appeal lies to this court.

It ill behooves a nationalized corporation of Communist Czechoslovakia to assert a sympathetic interest in American foreign policy. Moreover, it is well established and seem self-evident that the interest of the United States in domestic litigation, because of the alleged impact thereof on our foreign policy, may be asserted only by authorized officers of the Federal Government. See *Ex Parte Peru*, 318 U. S. 578.

Neither the Department of State, nor the Department of Justice, has appeared or intervened in this litigation at any stage. Accordingly, there is no merit whatever to appellant's contention that a substantial federal question is presented because American foreign policy may be affected by the decision of the New York court below.

POINT II

The appointment of a receiver of defendant-appellant's property in New York rests upon non-federal grounds.

A.

As appears from the title of the action, the appellant herein is a Czechoslovakian national corporation. It came into existence when the Czechoslovakian Government caused it to take over the assets of its predecessor, the Zivnostenska Banka, in accordance with Decree No. 102 of 1945 (Appendix to Appellant's Brief, p. 22). Subsequently, the National Assembly of the Czechoslovakian Republic enacted Law No. 31 of 1950, which provided for the seizure by the State Bank of Czechoslovakia of all the rights and obligations of the Zivnostenska Banka, National Corporation (Appendix to Appellant's Brief, p. 28).

When this action was commenced, the State Bank of Czechoslovakia interposed a claim of sovereign immunity. This claim was denied (R. 1, fols. 609-641), and its denial has not been appealed to this court. Hence, it must be conclusively presumed for purposes of this appeal that both defendant, Zivnostenska Banka, National Corporation, and the State Bank of Czechoslovakia were at all times subject to the processes of the New York State courts as ordinary private litigants. The New York courts based their jurisdiction on New York State's power to control private property within the forum. Therefore, no Federal question is presented by the appointment of a receiver over appellant's property having a situs within New York.

United States v. *Bank of New York & Trust Co.*, 296 U. S. 463, 478.

B.

Any privilege to assert the presence of a Federal question in the instant case has been waived. A claim of sovereign immunity or of special right under international law or American foreign policy must be asserted either by the accredited representative of a foreign government or by the Federal Government. No such assertion was made in the New York courts by the Government of Czechoslovakia or by the United States, and there has been no appearance herein by either sovereignty. Hence, the representatives of defendant-appellant, which is a mere private party litigant, have no standing to assert that Czechoslovakia's international position or the foreign policy of the United States present an issue requiring or justifying an appeal to this Court. See *Ex Parte Muir*, 254 U. S. 522; *Kunglig, etc.* v. *Dexter & Carpenter, Inc.*, 32 F. 2d 195, 200; *Lamont* v. *Travelers Insurance Company*, 281 N. Y. 362, 372, 24 N. E. 2d 281; *Holzer* v. *Deutsche Reichsbahn Gesellschaft*, 289 N. Y. S. 943, 160 Misc. 579; see also *The Navemar*, 303 U. S. 60.

Conclusion

WHEREFORE, for the reasons set forth in Respondent's Brief and in this Brief, it is respectfully submitted that appellant's jurisdictional statement has not indicated the existence of any substantial Federal question and that there is no warrant for an appeal to this Court. The motion to dismiss the appeal should be granted.

Respectfully submitted,

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